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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARINE SHALE PROCESSORS, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Article III and the Seventh Amendment of the United States Constitution permit a federal agency to administratively adjudicate factual and legal issues in direct conflict with a prior jury verdict and judgment of a federal district court on the same issues in litigation that the agency had previously initiated?

2. Whether the Fifth Amendment right to procedural due process permits a federal administrative agency to utilize as decisionmakers in an agency administrative proceeding on an application for an operating permit the same officials who were actively litigating the identical issues against the permit applicant in federal court?

LIST OF INTERESTED PERSONS AND RULE 29.6 NOTATION

The parties to the proceeding below were petitioner, Marine Shale Processors, Inc., and respondent, the United States Environmental Protection Agency.

Petitioner certifies under Rule 29.6 that it has no parent or nonwholly owned subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marine Shale Processors, Inc. ("MSP"), respectfully asks this Court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit, No. 95-60228, is reported at 81 F.3d 1371 and reprinted in the appendix hereto, pp. 1a-29a, *infra*. A jury verdict, judgments, and orders and reasons of the United States District Court for the Eastern District of Louisiana in a related proceeding filed by the EPA, which are necessary to ascertain the grounds of the decision under review, EPA's statement of the basis for the permit denial dated September 15, 1994, the Environmental Appeals Board's final decision and order dated March 17, 1995 affirming the permit

denial, and EPA's final agency action are reprinted at pp. 30a-206a, *infra*.

JURISDICTION

The Fifth Circuit entered its judgment on April 18, 1996 (Appendix, 209a). The timely petition for rehearing was denied on June 18, 1996 (Appendix, 207a-208a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case implicates Article III and the Fifth and Seventh Amendments of the Constitution of the United States, 5 U.S.C. §§ 702, 704, and 706 (the Administrative Procedure Act ("APA")), 46 U.S.C. §§ 6925 and 6976(b) (the Resource Conservation and Recovery Act ("RCRA")), and EPA regulations adopted pursuant to the RCRA, including 40 C.F.R. §§ 124.3 (1983), 260.10 (1985), 261.1 (1985), 266.20 (1985), 266.100 (1991), and 270.10 (1991). The pertinent texts of these provisions are set forth in the appendix at pp. 210a-239a, *infra*.

INTRODUCTION AND STATEMENT OF THE CASE

This case involves extraordinary overreaching by a federal administrative agency in violation of the doctrine of separation of powers and the constitutional rights to trial by jury and due process. These matters of constitutional dimension affect not only the parties in this proceeding, but also the entire landscape of federal administrative review. This petition presents issues of truly national magnitude on important questions of federal law that this Court should settle for the guidance of all administrative agencies and federal courts.

MSP asks this Court to decide core issues that are basic to the interaction between federal agencies and federal courts. EPA filed suit against MSP and asked a

federal court and jury to declare MSP to be the operator of an "incinerator" without a permit. The Article III court and the Seventh Amendment jury refused to do so, finding instead that MSP operated an "aggregate kiln" that produced "aggregate." EPA assigned the same personnel who had been involved in the litigation to consider MSP's administrative application for a permit that EPA regulations afford an operator of an aggregate kiln. EPA denied the permit application, specifically disagreeing with the jury and declaring that MSP was not an aggregate kiln but an "incinerator", the status of MSP that the agency has wanted all along.

Article III, the Seventh Amendment, and fundamental principles of due process do not permit such an abuse of power, but the Fifth Circuit affirmed the EPA's decision. Under the Fifth Circuit's analysis, the same federal administrators who litigated unsuccessfully in the federal court can reach a self-serving administrative result in direct conflict with a jury's findings on the same issue.

This case presents certworthy questions at the heart of the basic structure of our tripartite government. Federal agencies must be scrupulous in separating their enforcement and adjudicatory functions. They must also respect a citizen's right to trial by jury under the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Administrative agencies have power to determine privileges and permits within the limits of their statutory authority, and courts may defer to them in proper cases. But, there is no wisdom in allowing an administrative agency specifically to overrule a jury's findings of a citizen's status, a declaration that the administrative agency had itself requested in the first place. Furthermore, there is no constitutional basis under due process for allowing an agency to set itself up as prosecutor and judge, assign the same agency personnel to decide the permit application who

had litigated the case in federal court, and deny the permit by reaching conclusions that contradict the jury's verdict on the same issue.

In this case, the Fifth Circuit has reached a result in conflict with decisions of this Court and the Seventh Circuit on these very points. This Court should grant review to address these fundamental structural issues involving the delicate balance of power between courts and administrative agencies and the constitutional rights of regulated citizens.

A. Regulatory Background

Beginning in 1980, EPA promulgated a series of regulations governing the treatment, storage, and disposal of hazardous waste under RCRA. The initial 1980 rules required permits for "incinerators", which EPA defined as devices using "controlled flame combustion, the primary purpose of which is to thermally break-down (*i.e.*, destroy) hazardous waste." 40 C.F.R. § 260.10 (1980). Facilities that recycled—as opposed to destroyed—hazardous waste were not subject to permitting requirements.

On January 4, 1985, EPA issued amended recycling rules defining the term "recycle" as material that is "used, reused, or reclaimed". 40 C.F.R. § 261.1(c)(7) (1985). At the same time, EPA promulgated a rule exempting a "product" from further RCRA regulation if it was produced for the general public's use and if the recyclable materials used to produce it underwent a "chemical reaction" during production "so as to become inseparable by physical means". 40 C.F.R. § 266.20(b) (1985). EPA further defined a new category of thermal combustion devices called "industrial furnaces." 40 C.F.R. § 260.10 (1985). This term encompassed "any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy." 40 C.F.R. § 260.10

(1985). The definition enumerated twelve devices, including "[a]ggregate kilns." *Id.* A thirteenth category on the list included "[s]uch other devices" as EPA's administrator may add on the basis of specified and appropriate factors. *Id.*

Since July 31, 1985, MSP has operated an aggregate kiln system producing aggregate products in Amelia, Louisiana. MSP has always contended that as a recycler producing a product it is therefore exempt from further RCRA regulation as described above. MSP always has denied that it operates an "incinerator", maintaining instead that it operates an "industrial furnace," specifically an "aggregate kiln."

B. Prior District Court Proceedings

EPA disagreed with MSP and on June 14, 1990 filed suit in the United States District Court for the Western District of Louisiana in *United States of America v. Marine Shale Processors, Inc.*, Civil Action No. 90-1240 (E-14). EPA alleged in essence that MSP did not operate an aggregate kiln or industrial furnace, but rather operated a regulated incinerator without a necessary permit.

After it had filed its lawsuit but before trial began, EPA promulgated new rules in 1991 requiring that all devices using thermal combustion to treat hazardous waste must have either an "incinerator permit" or a "boiler and industrial furnace permit" ("BIF permit") by August 21, 1991. To qualify for a permit to burn hazardous waste in boilers and industrial furnaces under the BIF permit, a facility was required to (1) meet the definitional qualifications of an industrial furnace, and (2) satisfy the specific environmental control and emissions standards. 40 C.F.R. §§ 124.3(c), 266.100, and 270.10. As noted earlier, under 40 C.F.R. § 260.10, *one of the twelve definitions and examples of an "industrial furance" is an "aggregate kiln"*.

In compliance with these rules, MSP filed a BIF permit application in May 1991, stating as it has since its inception in 1985 that it is an aggregate kiln and therefore an industrial furnace. EPA responded to the application by recognizing the supremacy of the district court and stating that it would await the district court's resolution of the question whether MSP was an incinerator or an aggregate kiln:

> It is the EPA's position that the MSP kiln is a hazardous waste incinerator, not an industrial furnace. *However, EPA will continue to process MSP's industrial furnace Permit Application as it would for any other facility until the issue of MSP's status is resolved by the Court.*

(EAB-66 (emphasis added)). Consistent with that view, EPA took no final action on the application for more than three and one-half years.

MSP's status as an aggregate kiln was the principal issue to be resolved in federal district court. EPA moved for summary judgment, arguing that neither MSP's oxidizers nor its rotary kiln was an industrial furnace. EAB-83, Ex. 1 at 2. EPA identified as contested issues for trial whether MSP should be classified as an industrial furnace, whether MSP was the manufacturer of aggregate, and whether MSP's oxidizers and kiln met the definition of an aggregate kiln under 40 C.F.R. § 260.10. Pretrial Order at 34, 59. EPA told the jury that "this case is all about . . . whether or not this company, this plant, is manufacturing anything, whether or not it is a manufacturing process. . . ." E-1, (4/18/94) 6.

The jury trial focused squarely on the question whether MSP was an incinerator or an aggregate kiln. The evidence, arguments of counsel, and the jury instructions all highlight that very point. Both EPA and MSP called experts, all of whom testified about the differences and commonalities between MSP's kiln system, incinerators, and other aggregate kilns. E-1: V.6:35 (4/20/94);

V.7:36-40 (4/20/94); V.15:5-8 (4/26/94); E-1: V.9:32, 34-35, 52-65 (4/21/94); V.46:18, 33, 36-37 (5/16/94); E-1: V.25:9 (5/4/94); V.30:18, 22, 36-37, 41 (5/5/94); V.33:36, 105-07 (5/6/94); V.34:22, 54-55 (5/9/94). Numerous witnesses, including MSP's customers, testified concerning the actual and potential commercial use of MSP's aggregate. E-1: V.35:9, 16-32 (5/9/94); V.32:41-43 (5/6/94); V.30:58, 63, 78-79 (5/5/94); V.28:82 (5/5/94); V.34:6-7 (5/9/94); V.29:4-11 (5/5/94); V.28:52-61 (5/5/94); V.29:30, 35, 56-61 (5/5/94). MSP introduced into evidence EPA's own prelitigation study conducted in March 1991, which found that MSP's aggregate is a viable construction material. D-317. In closing argument, EPA focused on "the question that the Government has the burden on, whether Marine Shale's incinerator, [as] we call it, is an aggregate kiln. . . ." E-1, V.54:19 (5/19/94).

The district court instructed the jury on the issue of what constitutes an aggregate kiln and asked the jury to resolve three principal issues: (1) whether MSP was entitled to the recycling exemption, (2) whether MSP's aggregate satisfied the product rule's requirements, and (3) whether MSP was an incinerator or an aggregate kiln furnace. On May 24, 1994, the jury answered two pivotal interrogatories, Numbers 10 and 13, in MSP's favor:

> Is MSP's rotary kiln an aggregate kiln? Yes.
>
> Are the rotary kiln, Oxidizers Nos. 1 and 2, and slag box part of a kiln system that produces aggregate? Yes.

(EAB-9, Ex. 14; Appendix, 32a). At a hearing on motions for judgment as a matter of law, the district judge respected the jury's findings:

> [H]ere, as often is the case, we are presented with mixed facts and legal issues, and I defer to the jury's conclusions.
>
> The legal issues, of course, include the meaning of the terms used in the statute and regulations. For

> example, what does "aggregate kiln" mean? These legal issues are mixed with fact issues such as the facts involved in the method by which MSP operates its facility, the fact issue of whether the industry involved would consider this to be an aggregate kiln, et cetera.
>
> I conclude, applying the regular test that has been repeated many, many times in appellate decisions, that there is sufficient evidence for a reasonable trier of fact to resolve the issues as the jury did.
>
> To state it differently, after considering all the evidence and reasonable inferences therefrom. I conclude that a reasonable jury could arrive at the results which this one did with respect to Interrogatories 10, 11, 12 and 13.

(E-1, V.II, 17-19, 06/15/94 (emphasis added). Appendix, 35a). In subsequent orders and reasons and judgments, the district judge recognized and adopted the jury's findings that MSP was an aggregate kiln (Appendix, 39a-59a).

C. Administrative Proceedings

Notwithstanding the jury's findings and the district court's orders adopting them, only three months later, on September 15, 1994, EPA ruled on the identical record and evidence that MSP is not an aggregate kiln and denied MSP's BIF permit application. E-27 (Appendix, 60a-129a). Although the jury found that MSP operates an aggregate kiln, EPA denied the permit because it "determined" that "MSP does not meet the definition of aggregate kiln and, therefore, does not meet the definition of industrial furnace at 40 C.F.R. § 260.10." EAB-37 at 1 (Appendix, 64a). EPA further rejected the district court's ruling that a kiln system qualifies as an industrial furnace, declaring that the district court "misunderstood" an EPA memorandum on this issue. EAB-37 at 2 (Appendix, 66a, 116a).

The same officials who were active in the genesis and prosecution of EPA's unsuccessful litigation in federal district court over the same adjudicative issues were the authors of the agency's findings of fact and conclusions of law denying MSP's permit application. Dr. Allyn Davis, Director of EPA Region VI's Hazardous Waste Management Division, was instrumental in EPA's decision to sue MSP in 1990. EPA listed Davis, Terry Sykes of the Office of Counsel of U.S. EPA Region VI, and Steven Silverman of the EPA's Office of General Counsel as trial witnesses against MSP (Pre-Trial Order, at 413, 431, and 433). Silverman and Davis provided deposition testimony; and Silverman was listed as an expert witness and authored an expert report used by the Government against MSP [D-Box 2 (1/31/94); EAB-3, Supp.Ex. 1; B-1]. Sykes served as trial counsel and argued on EPA's behalf against MSP before the district court. Despite playing an active and principal role in the federal enforcement action from its inception in 1990, Sykes authored the EPA's findings of fact and conclusions of law in the BIF permit proceeding. This role directly conflicted with Sykes' statement to the district court in the enforcement case that she was completely walled-off from the BIF Permit proceeding (E-1; Hearing Tr., 9/8/83, at 38).

MSP appealed the Region 6 decision to the Environmental Appeals Board ("EAB"). Sykes and Silverman represented EPA before the EAB at oral argument (EAB-81). The EAB affirmed EPA's denial of MSP's permit and aggregate kiln status (Appendix, 130a-201a). Despite substantial record evidence, which the jury had considered, that MSP's aggregate was suitable for numerous commercial purposes, the EAB held that MSP does not produce "commercial-grade aggregate" and cannot be an "aggregate kiln" or considered an "industrial furnace" within the meaning of 40 C.F.R. § 260.10. EAB-89 at 2-3. (Appendix, 150a-151a). EAB further recognized that EPA had committed "a mistake in judgment" by allowing a member of the civil litigation enforcement

team to write the agency's findings of fact and conclusions of law on the permit denial, but held that this improper commingling of adjudicative and prosecutorial functions did not violate MSP's due process rights. *Id.* at 44-45. (Appendix, 191a-192a).

D. Fifth Circuit Proceedings

Invoking jurisdiction under 42 U.S.C. § 6976(b), the RCRA, and 5 U.S.C. §§ 704-706, the APA, MSP timely filed a petition for review in the United States Court of Appeals for the Fifth Circuit from the EPA's final agency action denying MSP's application for a BIF permit. The Fifth Circuit affirmed (Appendix, 1a-29a; 81 F.3d at 1371-86). The court of appeals recognized that "EPA rested upon its finding that MSP's rotary kiln system did 'not meet the definition of aggregate kiln and, therefore, does not meet the definition of industrial furnace' ", that "EPA has, to be sure, disagreed with several of the conclusions of the district court", and that "[t]he permit application and the district court litigation involve common issues." (Appendix, 4a and 7a; 81 F.3d at 1375 and 1377). But the appellate court rejected MSP's arguments based on Article III, the Seventh Amendment, and principles of collateral estoppel (Appendix, 5a-15a; 81 F.3d at 1375-80). The Fifth Circuit found no due process violation through EPA's failure to prevent its personnel who litigated in the district court action from participating in the permit denial process, despite recognizing Dr. Davis' role in overseeing both the enforcement and permitting issues in Region VI of the EPA and concluding that "Ms. Sykes' role in the process was less than ideal and the EAB correctly labeled it a mistake in judgment." (Appendix, 26a; 81 F.3d at 1385).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH CONSTITUTIONAL IMPERATIVES AND DECISIONS OF THIS COURT BY PERMITTING A FEDERAL AGENCY UNILATERALLY TO REJECT FACTUAL AND LEGAL DETERMINATIONS OF A FEDERAL COURT AND JURY

The Constitution separates and divides the powers of government in order to "diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), *quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This constitutional division seeks "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983). EPA has overstepped the limits of its power in ways that call into question the appropriate roles of federal agencies and federal courts. Accordingly, this case is an especially suitable vehicle for this Court to define the constitutional limits on an administrative agency's attempt to usurp the role of the judiciary and jury. Unless the decision below is reversed, the EPA, SEC, FDA, FTC, or any other federal agency with enforcement and regulatory permitting powers can litigate and lose an issue before a jury in federal court, and then, unhappy with that result, simply disregard the jury's verdict with impunity and write an administrative opinion that the agency wanted all along on the very same issue.

The decision below conflicts with this Court's decisions under several constitutional provisions. Under Article III, the controversy that EPA voluntarily brought to the district court in 1990—whether MSP produces aggregate in an aggregate kiln—must be decided by the district court and not unilaterally by the administrative agency. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408, 1 L.Ed. 436

(1792); *Plaut v. Spendthrift Farm, Inc.*, —— U.S. ——, 115 S.Ct. 1447, 131 L.Ed.2d 328, 346-47 (1995); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937). Having asked the district court to resolve the controversy, EPA cannot anoint itself as the judge of its own case against MSP.

Moreover, the Seventh Amendment to the U.S. Constitution directly prohibits the agency action that the decision below confirms:

> . . . the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise re-examined in any Court of the United States*, than according to the rules of the common law.

(Emphasis added). EPA's lawsuit asking the federal district court to decide whether MSP operates an aggregate kiln necessarily implicates MSP's Seventh Amendment right to trial by jury. *Tull v. United States*, 481 U.S. 412, 425 (1987). Once the Seventh Amendment is activated on a factual issue, a party is entitled to have the question resolved by a jury. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550-53 (1990). "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency. . . ." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). EPA's attempt to distinguish its adjudicative function as a "permit proceeding" is precisely the type of relabeling that this Court condemned in *Granfinanciera*. If Congress lacks constitutional authority to strip a party of those rights, *a fortiori* an agency lacks such authority. The same constitutional protection precludes an agency from usurping the role of the jury on other aspects of the case that remain pending in the district court. *Cf. Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959) (judicial determinations on equitable claims must await jury verdicts). The constitutional infirmity in the decision below is thus one that embraces all federal agencies.

This Court has frequently had to clarify the binding effect on the government of adverse judicial rulings. *See e.g., United States v. Stauffer Chemical Co.*, 464 U.S 165 166-67 (1984) (government collaterally estopped from relitigating "the statutory issue" because "[the government] ha[d] already litigated that question against Stauffer and lost"). *See also Blinder, Robinson & Co., Inc. v. S.E.C.*, 837 F.2d 1099, 1107 (D.C. Cir.), *cert. denied*, 488 U.S. 869 (1988) (agency not entitled to "a second bite at the apple" after it has "failed to convince an Article III judge of the merits of a particular remedy"). Unless this Court exercises its certiorari jurisdiction and reverses, the decision below creates a road map giving any federal agency "a 'no-lose' posture in this and all similar cases. If the jury resolves factual issues in favor of [the agency], the [agency] wins; if against [the agency]," the agency simply overturns the decisions in its own administrative proceeding. *Dagnall v. Department of Highways, State of Louisiana*, 466 F.Supp. 245, 248 (E.D.La. 1979), *vacated on other grounds, appeal dismissed*, 631 F.2d 1195 (5th Cir. 1980).

Both the BIF permit proceeding and the district court enforcement action shared a single major issue: Was MSP an aggregate kiln? Each proceeding had a *single* controversy and issue: the status of MSP. The jury's determination of MSP's status as an aggregate kiln should have been conclusive in the EPA permit proceedings for future operations. If, as the jury found, MSP is an aggregate kiln, then MSP's past operations were lawful and MSP's facility is qualified for a BIF permit for future operations. The fact that two proceedings may be necessary does not mean that two proceedings have a different question or controversy. *See Plaut v. Spendthrift Farm, Inc., supra; Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, supra; Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *Hayburn's Case, supra; Town of Deerfield, N.Y. v. F.C.C.*, 992 F.2d 420, 427-30 (2d Cir. 1993).

Consistent with the decision below, a convicted felon, who administratively contests his resultant inability to vote or obtain a firearm permit, could argue that his prior conviction resolved only his prior acts and that subsequent administrative proceedings to obtain a permit to carry a firearm or a voter's registration card (which govern his future conduct, not his past) are separate and different. The clear and simple response is that his status as a convicted felon, while determined in a proceeding relative to past conduct, is conclusive of his future entitlements of rights and permits. So too, the single decision that MSP had the status of an aggregate kiln was common to both the district court and EPA proceedings. In its orders of June 20, 1994 and August 30, 1994 in the proceedings initiated by the EPA, the district court adopted the jury's findings that MSP was an aggregate kiln producing aggregate. Thereafter, in September, 1994, with exactly the same evidence, witnesses, and issues. EPA in effect overruled the lower court's finding of status and denied MSP's application for a BIF permit, claiming MSP was *not* an aggregate kiln.

By initially failing to recognize that the single controversy of MSP's status determines both the court and administrative proceedings, the Fifth Circuit stated that a single proceeding could not resolve both the permit application and the lawsuit:

> In this case, in contrast, the district court may not grant a permit, and the adjudicatory arm of EPA may not grant the relief sought in EPA's district court complaint. A single proceeding could not resolve both issues.

(Appendix, 11a; 81 F.3d at 1379). Yet, a single proceeding *did* and *could* decide the single determinative issue in both: the status of MSP as an aggregate kiln. Having resolved that controversy, the district court's decision should also automatically resolve the permit proceedings. Although the permit proceedings certainly involved

other issues besides MSP's status as an aggregate kiln, there is still simply no way the EPA could have denied MSP its permit if it abided by the district court's finding that MSP was indeed an aggregate kiln. EPA in its advocacy may say otherwise, but the regulations are crystal clear that an aggregate kiln is an industrial furnace entitled to the status of a BIF.

The Fifth Circuit properly observed that 40 C.F.R. § 260.10 defines industrial furnace as "any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy", and that the definition lists a series of twelve devices by name, referred to as the "twelve apostles" in both the district court and the Fifth Circuit (Appendix, 12a; 81 F.3d at 1379). "Aggregate kilns" are one of the twelve apostles. The Fifth Circuit also properly noted:

> As applied to this case, then, section 260.10 requires EPA to grant MSP a permit if Marine Shale's kiln is (1) an aggregate kiln, (2) that is an integral component of a manufacturing process, and (3) that uses thermal treatment to accomplish recovery of materials or energy.

(Appendix, 12a; 81 F.3d at 1379). That should have ended the inquiry. But the Fifth Circuit then focused upon paragraph 13 of the definition of "industrial furnace" in Section 260.10, which allows the EPA to add *other* devices to the list of twelve. The court of appeals specifically focused on the first of the supplemental five factors —"[t]he design and use of the device primarily to accomplish recovery of material products". The error in considering paragraph 13 is that once a device is found to be one of the "twelve apostles", neither the EPA nor the Fifth Circuit should ever reach paragraph 13. That is, paragraph 13 is not an additional requirement that one of the 12 apostles must meet; paragraph 13 applies only if you are not one of the twelve apostles and want to become a thirteenth.

The ramifications of EPA's flat rejection of the jury verdicts are magnified by the fact that the record in the BIF permit proceeding was identical to the record before the jury in the enforcement proceeding. The exact same experts relied upon by the EPA had appeared before the district court and jury a few weeks earlier; the exact same documents that were submitted to the EPA had been submitted to the district court and the jury; and the district court and jury personally "eyeballed" and made credibility decisions on the exact same experts who "appeared" only on paper in EPA's office in Dallas, Texas. Once the district court and jury assessed these experts' opinions in the crucible of cross-examination, the EPA staff cannot thereafter nullify the decision.

In short, the decision below condones a dangerous incursion of the Executive Branch into the province of a federal jury. Accordingly, this Court's review is fully warranted.

II. THE COURTS OF APPEALS ARE IN CONFLICT ON THE QUESTION WHETHER AN AGENCY MAY ASSIGN REGULATORY ADJUDICATION FUNCTIONS TO THE SAME OFFICIALS ACTIVELY LITIGATING AGAINST A PARTY IN A RELATED ENFORCEMENT ACTION

The reasons for this Court to grant certiorari are especially compelling in this case because EPA used the same personnel who had actively litigated the suit in federal court to decide the administrative permit application. EPA not only violated Article III and the Seventh Amendment by usurping the federal court and jury's functions, but compounded the injustice by infringing on fundamental principles of due process in direct conflict with decisions from this Court and the Seventh Circuit. This case presents an issue at the heart of administrative staffing and decisionmaking that this Court should address.

EPA appointed the same key EPA enforcement personnel to decide the permit application and write and finalize the agency's findings of fact and conclusions of law while they were actively litigating the identical issues against MSP in federal court. The final denial of MSP's permit by EPA occurred literally within days of the August 30, 1994 judgment of the district court. The application rested for mere hours on the desk of the deciding official, Allyn Davis (RE, Vol. 9, pp. 990). The sheer volume of the administrative record (which included the entire trial record) precluded Davis from applying anything but his oft-proclaimed, previously entrenched view adverse to MSP.

EPA publicly announced its position that MSP is an "incinerator" and not an aggregate kiln industrial furnace when it filed its district court complaint in 1990. Davis was the Region VI official responsible for deciding to bring the district court action. EPA affirmed his public commitment to its case by listing him as a trial witness (Pre-Trial Order, at 413). He continually reiterated his set views adverse to MSP in his 1991 initial public letter responding to the BIF application (EAB-66) and in subsequent deposition testimony (EAB-3, Supp. Ex. 1). At his July 1993 deposition in the enforcement litigation, Davis repeatedly admitted that he had conclusively decided that MSP is not an industrial furnace by 1986, *eight years before* EPA's purported "review" of the BIF administrative record and Davis' adjudicative decision that MSP was an incinerator (EAB-3, Supp. Ex. 1 at 54, and 36-37). Having affirmed his personal stake in and commitment to EPA's formal litigation positions, Davis was precluded from any role in the BIF permit application, much less pivotal decisionmaking responsibility.

Furthermore, Terry Sykes, an enforcement attorney for EPA in the district court proceeding, wrote the draft decision for the EPA in the BIF permit proceeding. The Fifth Circuit observed, "Ms. Sykes was one of the United

States' attorneys in the enforcement action before trial and early in the trial itself." (Appendix, 25a; 81 F.3d at 1385). Indeed, Sykes was at the 1991 preliminary injunction hearing, attended numerous depositions thereafter, and participated in the district court trial throughout the *entire* proceedings. At times during the trial, Sykes was the *only* government attorney present to represent the United States. Trial Tr., Vol. 57, pp. 10-19, 31-32, 5/20/94. A *few* short weeks later, after the jury returned verdicts against the government, the EPA draft opinion she wrote became final. All of this occurred after Sykes represented to the court that as an enforcement attorney she was "walled off" from the permitting process (Tr. 9/8/93 at 38).

In allowing such commingling of prosecutorial and adjudicatory functions, the decision below directly conflicts with the Seventh Circuit's decision in *Bethlehem Steel Corp. v. U.S. E.P.A.*, 638 F.2d 994 (7th Cir. 1980). In *Bethlehem*, attorneys "who were in charge of the ongoing enforcement proceedings against Bethlehem" were also the "attorneys principally in charge of reviewing and recommending a disposition of a [delayed compliance order]" within the agency's administrative process. 638 F.2d at 1008. In addition, the administrative decision was "substantially identical to the language used in a memorandum written by the lead EPA enforcement attorney." *Id.* at 1010. The Seventh Circuit concluded that the joint prosecutorial/adjudicatorial roles played by the attorneys "cast a shadow over, at least, the appearance of fairness in the Agency's review procedures. . . ." *Id.*[1]

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[1] The infirmity of the decision below is all the more manifest because, at the very least, MSP made a *prima facie* showing of bias and prejudice that entitled it to discover the identities and roles of the members of the decisionmaking body in the denial of MSP's BIF permit application. A federal agency is "bound to ensure that its procedures meet due process requirements. Therefore, discovery must be granted if in the particular situation a refusal to do so would prejudice a party [so] as to deny him due process." *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979); *N.L.R.B. v. Valley Mold Co., Inc.*, 530 F.2d 693 (6th Cir), *cert. denied*, 429

The decision in *Bethlehem Steel* is consistent with this Court's repeated admonition that an agency's decisionmaker must be unbiased and impartial. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). A decisionmaker's disqualification is automatically warranted "in any case in which he has a substantial interest, has been of counsel, [or] is a material witness. . . ." *Laird v. Tatum*, 409 U.S. 824, 828 (1972) (citation omitted). Even more fundamentally, the Constitution requires that "no man shall be a judge in his own cause." *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (*quoting Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (1610)). Accordingly, this case provides an opportunity for this Court to resolve a recurring issue that has broad application to all agencies.

Davis, Silverman, and Sykes certainly do not qualify as unbiased and impartial administrators in this case. Davis spearheaded EPA's efforts to sue MSP. Sykes wrote the enforcement referral. Sykes, Silverman, and Davis were all listed by EPA as trial witnesses against MSP. Silverman and Davis provided deposition testimony, and Silverman authored an expert report used by the Government against MSP. Sykes served as trial counsel and argued on EPA's behalf against MSP before the district court. So clear was the impropriety of Sykes' having any

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U.S. 824 (1976); *J. H. Rutter Rex Mfg. Co. v. N.L.R.B.*, 473 F.2d 223 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973); and *Electomec Design & Development Co. v. N.L.R.B.*, 409 F.2d 631 (9th Cir. 1969). *See also N.L.R.B. v. Rex Disposables, Div. of DHJ Industries, Inc.*, 494 F.2d 588, 592 (5th Cir. 1974). Indeed, the refusal to divulge information about the roles of these individuals in the denial of MSP's BIF permit "would be an unfair restriction of an inquiry into possible disqualification." See *R.A. Holman & Co. v. S.E.C.*, 366 F.2d 446, 453 (2d Cir. 1966), *cert. denied*, 389 U.S. 991 (1967). In conflict with all of these authorities, the Fifth Circuit did not even remand the case to permit discovery into the potential bias of the decisionmakers.

role in the permit proceeding that EPA initially barred her completely from any participation. Yet, the agency breached that ethical wall when it assigned her to write its findings of fact and conclusions of law denying MSP's BIF application. The participation of these key EPA personnel in both the court and administrative proceedings goes beyond a mere appearance of bias. It refutes any presumption of an administrator's good faith conduct. This Court should grant certiorari to review this denial of procedural due process that affects the basic integrity of administrative review.[2]

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[2] Furthermore, EPA violated substantive due process by denying the permit application under its unbridled notion of "omnibus authority." (Appendix, 66a). The RCRA unequivocally states that the administrator "shall issue a permit for such facilities" upon determining that the applicant complies with the technical BIF requirements. 42 U.S.C. § 6925(c)(1). This statutory language is mandatory, not discretionary. It leaves no room for EPA's interpretation that it has "omnibus authority" to deny a permit to a facility that meets BIF's technical requirements. The statute further states that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." 42 U.S.C. § 6925(c)(3). This provision grants EPA the narrow authority to include additional terms and conditions in issued permits beyond those found in the regulations where necessary "to protect human health and the environment." But no language in the provision authorizes EPA to deny permits. Once MSP met the technical BIF requirements, the agency had an administrative duty to issue a permit. *See Southern Co-op. Dev. Fund v. Driggers*, 696 F.2d 1347, 1356 (11th Cir.), *cert. denied*, 463 U.S. 1208 (1983).

EPA's distortion of the statute would authorize this agency unilaterally to deny a permit even when it is undisputed that the facility can meet all the technical requirements established to safeguard human health and the environment, as long as the agency in its discretion feels otherwise. That position violates substantive due process. *See Southern Co-op. Dev. Fund*, 696 F.2d at 1356 (imposition of requirements upon a permit applicant, not included in ordinance, violates substantive due process); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) ("[A]ppellants stated a substantive due process claim when they alleged

As this Court has stated, "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Administrative officers executing the provisions of a statute have no right to disregard the fundamental principles inherent in due process. *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-101 (1903). "The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Reid v. Covert*, 354 U.S. 1, 17 (1957). Unless this Court grants certiorari and reverses, the decision below sets a dangerous precedent for federal agencies to ignore with impunity the limits of their statutory authority.

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that the City acted capriciously and arbitrarily" by imposing conditions on the granting of a permit not in the statute).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-60228

MARINE SHALE PROCESSORS, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

April 18, 1996

Petition for Review of Order of
Environmental Protection Agency

Before REYNALDO G. GARZA, KING and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case is an appeal of Marine Shale Processors, Inc. from final agency action of the Environmental Protection Agency. Specifically, MSP challenges EPA's decision to deny MSP's application for a Boiler and Industrial Furnace Permit required by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901-92K. This case is one of the trio described in *United States v. Marine,* —— F.3d —— (5th Cir.1996). We affirm.

I

In 1980, EPA promulgated regulations pursuant to RCRA governing the treatment, storage, and disposal of hazardous waste. *See, e.g.*, Final Rule, *Hazardous Waste Management: Overview and Definitions; Generator Regulations; Transporter Regulations,* 45 Fed.Reg. 12,721 (1980); Final Rule, Interim Final Rule, and Request for Comments, *Hazardous Waste Management System: Identification and Listing of Hazardous Waste,* 45 Fed.Reg. 33,082 (1980). These regulations defined two methods of processing waste, incineration and recycling. The rules required facilities engaged in incineration to procure a permit called a Subpart O permit, a reference to 40 C.F.R. pt. 264 subpt. O. *See* Proposed Rule and Request for Comment, *Identification and Listing of Hazardous Waste; Amendments to Definition of Solid Wastes,* 53 Fed.Reg. 519, 522 (1988). Facilities engaged in recycling could operate without permits. *See* 45 Fed.Reg. at 33,120 (promulgating 40 C.F.R. § 261.6); *see also* Final Rule, *Hazardous Waste Management System; Definition of Solid Waste,* 50 Fed.Reg. 614, 626-27 (1985).

In 1985, EPA defined a new category of hazardous waste professing devices called "industrial furnaces," a term defined to include "aggregate kilns" having certain characteristics. 50 Fed.Reg. at 661. Industrial furnaces could engage in either incineration or burning for energy recovery. If the industrial furnace facility engaged in incineration, then it needed a Subpart O permit. If the industrial furnace engaged in recycling, no permit was necessary. 50 Fed.Reg. at 626-27. MSP began operations in 1985, claiming an exemption from the Subpart O permit requirement on the grounds that its kiln was an aggregate kiln and that its facility was an industrial furnace engaged in recycling.

On August 14, 1990, the United States sued MSP in United States District Court for the Eastern District of Louisiana in the action giving rise to Nos. 94-30419 and

94-30664, claiming among other things that MSP had incinerated hazardous waste without a Subpart O permit since it opened for business in 1985. In 1991, EPA promulgated new rules requiring that all devices using thermal combustion to treat hazardous wastes have either a Subpart O permit or a new form of permit for recycling facilities called a Boiler and Industrial Furnace permit. Final Rule, *Burning of Hazardous Wastes in Boilers and Industrial Furnaces*, 56 Fed.Reg. 7134, 7138 (1991). These regulations ended the exception from the permit requirement for facilities engaged in recycling. MSP submitted a BIF permit application and a Certification of Compliance with BIF regulations. On the basis of these filings and its contention that it fit within the previously existing recycling exemptions, MSP claimed interim status to operate while EPA considered the permit application. EPA's internal consideration of MSP's application for a BIF permit proceeded simultaneously with litigation of the United States' action in Louisiana District Court.

On January 31, 1994, EPA issued a tentative decision denying MSP's BIF permit application. EPA rested its tentative denial decision upon its conclusion that MSP did not produce aggregate and that its system did not use thermal treatment to accomplish recovery of materials or energy within the meaning of 40 C.F.R. § 260.10. EPA opened its decision for public comment.

A jury trial on the United States' claim in district court that MSP had incinerated waste without a permit began in April, 1994. At the end of a five-week trial, the court submitted 13 interrogatories to the jury. In late May, the jury found itself able to agree to the answer to only nine of the questions. The questions relevant to this appeal, together with the jury's answer if any, were as follows:

> 1. Was MSP entitled to a recycler exemption from the requirement of a permit as an operator of an incinerator of hazardous waste? (unable to answer)

2. Were all of the hazardous wastes accepted by MSP beneficially used or reused or legitimately recycled? (unable to answer)

2(a). Were all of the hazardous wastes accepted by MSP prior to August 21, 1991, beneficially used or reused or legitimately recycled? (unable to answer)

10. Is MSP's rotary kiln an aggregate kiln? (yes)

13. Are the rotary kiln, oxidizers Nos. 1 and 2, and slag box part of a kiln system that produces aggregate? (yes)

Because the jury failed to answer four of the interrogatories, the district court declared a mistrial.

In September, 1994, EPA issued a final decision denying MSP's application for a BIF permit. EPA rested upon its finding that MSP's rotary kiln system did "not meet the definition of aggregate kiln and, therefore, does not meet the definition of industrial furnace." EPA also cited MSP's poor history of compliance with the environmental laws, as well as its finding that MSP could not qualify as an aggregate kiln because it destroyed hazardous waste. MSP appealed to the Environmental Appeals Board, relying on principles of Article III, the seventh amendment, collateral estoppel, due process, and the Administrative Procedures Act, 5 U.S.C. §§ 701-06.

In March, 1995, after a review of the record, the EAB affirmed EPA's denial. *In re Marine Shale Processors, Inc.*, Dkt. No. 06900009, RCRA Appeal No. 94-12, 1995 WL 135572 (EPA 1995). The EAB stated that MSP did not produce "commercial-grade aggregate" from its system and thus that its facility could not qualify as an aggregate kiln. The EAB questioned EPA's reliance on MSP's compliance history and on MSP's destruction of hazardous waste, but ultimately affirmed the decision in its entirety. In April, 1995, EPA finally denied MSP's BIF permit application

on all grounds stated in its September, 1994 ruling. MSP appeals the denial of its permit, invoking our authority under 5 U.S.C. § 706(2) to set aside final agency action. We affirm.

II

MSP invokes Article III, the Seventh Amendment, and collateral estoppel principles to attack EPA's permit denial.

A

MSP begins its assault upon the permit denial with constitutional arguments based on Article III and the Seventh Amendment. Its first argument is that Article III and the Seventh Amendment prevent EPA from ruling on its permit application. Its second argument is that the United States, by filing its lawsuit and thus invoking the judicial power of an Article III court, could not continue to consider in an internal administrative proceeding issues identical to those being litigated in the Article III court. With cites to Montesquieu and Madison, MSP argues that the moment the United States filed suit the district court obtained exclusive power to decide any issue before it and that EPA's permitting staff could not resolve any legal question pending before the district court without running afoul of the constitutional prohibition forbidding Executive Branch review of Article III court decisions. In a similar vein, MSP invokes the Seventh Amendment, contending that once the Seventh Amendment is activated as to an issue, a party is entitled to have the issue resolved by a jury.

With regard to both MSP's Seventh Amendment and Article III arguments, we begin with the proposition that, in the absence of a simultaneous district court proceeding, Congress violated neither constitutional principle by providing that EPA should adjudicate MSP's permit application. *See In re Texas General Petroleum Corp.*, 52 F.3d 1330, 1336 (5th Cir.1995) ("Whether an Article III

court is necessary involves the same inquiry as whether a litigant has a Seventh Amendment right to a jury trial.") (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54, 109 S.Ct. 2782, 2796, 106 L.Ed.2d 26 (1989)). MSP's contention to the contrary comes decades, perhaps centuries, too late. Congress's choice to grant EPA authority over the permit proceeding represents a classic constitutional example of the public rights doctrine.

Viewing our inquiry as governed by "practical attention to substance rather than doctrinaire reliance on formal categories," *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587, 105 S.Ct. 3325, 3336, 87 L.Ed.2d 409 (1985), we note the following characteristics of the permit proceeding. First, it is a dispute to which the sovereign is a party. *See Crowell v. Benson*, 285 U.S. 22, 50, 52 S.Ct. 285, 292, 76 L.Ed. 598 (1932); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372 (1855). Second, the permit requirement "serves a public purpose as an integral part of a program safeguarding the public health." *Thomas*, 473 U.S. at 589, 105 S.Ct. at 3337. Third, the scientific and technical nature of the decisions in this permit proceeding make the decision "peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell*, 285 U.S. at 46, 52 S.Ct. at 290. Fourth, the permit proceeding, and indeed most of RCRA itself, deals with a narrowly cabined area of the law. *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 852, 106 S.Ct. 3245, 3257, 92 L.Ed.2d 675 (1986) (referring to a "particularized area of law") (internal quotation marks omitted). Fifth, the permit application implicates a federal right not immediately analogous to the state common law causes of action "assumed to be at the 'core' of matters normally reserved to Article III courts." 478 U.S. at 853, 106 S.Ct. at 3258. Sixth, EPA, "unlike the bankruptcy courts under the 1978 Act, does not exercise 'all

ordinary powers of district courts', and thus may not, for instance, preside over jury trials or issue writs of habeas corpus." 478 U.S. at 853, 106 S.Ct. at 3258 (quoting *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85, 102 S.Ct. 2858, 2878, 73 L.Ed.2d 598 (1982) (plurality opinion)). Seventh, Congress has provided for judicial review over the agency's permit denial under 5 U.S.C. §§ 704-06. *See* 478 U.S. at 854-55, 106 S.Ct. at 3258-59. Under such circumstances, Congress violated neither the Seventh Amendment nor Article III in delegating the permitting decision to EPA.

Having established that EPA could constitutionally adjudicate the permitting proceeding in the absence of a suit by the United States, we address MSP's argument that the enforcement action altered the constitutional landscape. We find MSP's contention convincing in neither the Article III nor the Seventh Amendment context. At bottom, both arguments fail for the same reason: This is not a case in which EPA has sought to review or alter the decision in the district court, to reverse the district court's findings, or to interfere with the judiciary's ability to issue a binding decision. *Cf. Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792) (suggesting that the judiciary could not render an opinion as to whether a citizen was entitled to a pension when both the Secretary of War and the Congress retained power to decide whether to honor the judiciary's judgment); *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir.1993) (rejecting the FCC's attempt to alter or amend a federal court judgment). EPA has, to be sure, disagreed with several of the conclusions of the district court, but it has never sought to interfere with the effect that these conclusions have upon the causes of action being adjudicated there. The permit application and the district court litigation involve common issues, but the two proceedings are deciding different questions, the most important of which is that the permit proceeding concerns whether MSP may operate legally in the future, while the district court proceeding concerns whether MSP has operated legally in the past.

Should EPA attempt to use the rulings in the permit proceeding to collaterally estop MSP in the district court action, MSP's argument may have force; we make no comment on this question. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (holding that the Seventh Amendment does not prevent an equity court's determination of legal issues from estopping relitigation of the same issues in a subsequent action at law). But given that EPA could constitutionally adjudicate the permit application in the absence of the district court litigation, MSP can make no argument until the permitting proceeding has some effect upon the issues being decided in the district court litigation. When and if MSP feels that effect, it may litigate these issues.

Accordingly, EPA has never sought to judge its own case any more than it does in any normal permit application proceeding. If the permitting arm of the agency could constitutionally exercise jurisdiction over MSP's permit application in the absence of a district court proceeding, as we have held, then nothing in Article III prevented EPA's permit staff and the district court from proceeding simultaneously. Having established this general principle, we examine MSP's arguments in detail.

1

MSP argues that as a result of EPA's suit, Article III gave the district court exclusive power to decide the controversy between MSP and EPA. MSP points to no statute or constitutional provision granting exclusive jurisdiction to the federal district courts to decide all disputes between EPA and entities like MSP. Its argument assumes that there would be no Article III bar had EPA denied the permit and then filed the district court suit, or if EPA had litigated the suit to completion and then denied the permit.

We find MSP's Article III arguments unconvincing. State courts are not Article III courts, yet nothing in Arti-

cle III prevents a state court from litigating the same controversy pending before a district court. *Kline v. Burke Construction Co.*, 260 U.S. 226, 230, 43 S.Ct. 79, 81, 67 L.Ed. 226 (1922). In such cases, if the state court reaches final judgment first, its disposition may preclude further litigation in the district court without violating Article III. *Id.* at 233-34, 43 S.Ct. at 82; *Wayside Transportation Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868, 870-71 (1st Cir.1960). MSP cites to no case suggesting that this principle would change if the state itself were a party to both the state court and federal court litigation. Like the Sixth Circuit,

> We see no reason why the rule permitting a second tribunal to proceed to the decision of an in personam matter within its jurisdiction, in spite of the fact that another action between the same parties is pending in another tribunal, should not be applicable as between a United States District Court and a federal administrative agency in which Congress expressly has placed responsibility for regulation in a specific area.

Ashland Oil & Refining Co. v. FPC, 421 F.2d 17, 21 (6th Cir.1970).

MSP cites *California v. FPC*, 360 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962), for the broad proposition that any time a federal court has jurisdiction over a controversy in which an agency is a party, the agency must withhold administrative action until the court has reached a decision. We do not read *California* so broadly. In that case, the Supreme Court held that the FPC should not have approved a merger while a suit challenging the merger, filed by the United States, was pending in federal district court. Justice Brennan's majority opinion does not mention Article III. Instead, it justifies its holdings with "practical reasons," primarily the difficulty of unscrambling an already consummated merger.

MSP points out no analogous practical considerations in this case. To the contrary, EPA could reasonably decide that the district court litigation promised to continue for years. The EAB, for instance, considered MSP official George Eldredge's statement that "whatever action EPA proposes, and whatever the outcome of the lawsuit, the case is going to drag on for years. In the mean[]time, we'll be doing business as usual." *In re Marine Shale Processors, Inc.*, Dkt. No. 0690009, RCRA Appeal No. 94-12, 1995 WL 135572, at *17 (EPA 1994) (internal quotation marks omitted). EPA could conclude that awaiting the decision of the judiciary on those issues common to the district court litigation and the permit proceeding would unduly delay resolution of the important questions in the latter and would allow an admitted violator of the environmental laws to continue operating, perhaps in further violation of these laws, until the conclusion of the litigation and the inevitable appeal. Normally, speedy adjudication from an administrative agency is something to be encouraged, and we cannot fault EPA's decision not to await the unavoidably ponderous progress of the district court litigation.

2

For similar reasons, we reject MSP's seventh amendment argument. As EPA acknowledges, MSP has a right to a jury trial in the district court proceeding. *See Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). But because the permit application triggered a public rights dispute, MSP has no right to a jury trial in this proceeding. *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 445, 97 S.Ct. 1261, 1269, 51 L.Ed.2d 464 (1977); *see also id.* at 450, 97 S.Ct. at 1266 (noting that jury trials may be incompatible with agency processes). MSP cites no case holding that the pendency of an action in one tribunal in which a jury trial right attaches prevents another tribunal from proceeding without a jury. Unless and until MSP is prevented from litigating its defenses in the district

court to a jury, no arguable jury trial violation has occurred.

Nothing in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), requires a different result. In *Beacon Theaters*, the plaintiff filed an action seeking an injunction prohibiting the defendant from prosecuting an antitrust suit. The defendant counterclaimed in a complaint stating the antitrust cause of action and demanded a jury trial. The trial judge scheduled the hearing on the plaintiff's request for injunctive relief ahead of the jury trial on the defendant's antitrust claim. The Supreme Court held that the trial court abused its discretion in scheduling the equity suit first because such scheduling would have the effect of depriving the defendant of its right to a jury trial in the counterclaim. Crucial to this holding was the fact that modern rules of civil procedure allowed joinder and joint resolution of multiple claims of multiple parties, thus in effect giving the plaintiff an adequate remedy at law by joining all involved. *See id.* at 507, 509, 511, 79 S.Ct. at 954, 955, 957; *see also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73, 82 S.Ct. 894, 896-97, 8 L.Ed.2d 44 (1962) (interpreting *Beacon Theaters* in this manner); *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 550-52, 110 S.Ct. 1331, 1335-36, 108 L.Ed.2d 504 (1990) (discussing the importance of the fact that legal and equitable claims were tried in the same lawsuit in applying the *Beacon Theaters* rule). In this case, in contrast, the district court may not grant a permit, and the adjudicatory arm of EPA may not grant the relief sought in EPA's district court complaint. A single proceeding could not resolve both issues.

B

MSP next argues that EPA's premit denial violated the principle of collateral estoppel. In order to invoke collateral estoppel, however, "the issue under consideration [must be] identical to that litigated in the prior action."

Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1422 (5th Cir. 1995). MSP's collateral estoppel argument fails because the jury was either not asked to resolve or unable to resolve questions crucial to EPA's decision to deny MSP's permit application.

MSP based its BIF permit application to EPA upon the contention that its kiln system constituted an industrial furnace. 40 C.F.R. § 260.10 defines industrial furnace as "any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy." The definition then lists a series of twelve devices by name, which Judge Duplantier referred to as the "twelve apostles." "Aggregate kilns" are one of the twelve apostles. As applied to this case, then, section 260.10 requires EPA to grant MSP a permit if Marine Shale's kiln is (1) an aggregate kiln, (2) that is an integral component of a manufacturing process, and (3) that uses thermal treatment to accomplish recovery of materials or energy.

In addition, paragraph thirteen of the definition provides that EPA may add other devices to the list of the twelve apostles after consideration of five enumerated factors with a sixth catchall statement that EPA might consider "other factors, as appropriate." The first of these five factors is "the design and use of the device primarily to accomplish recovery of material products." The remaining four generally focus on the inquiry of whether a facility makes a product.

In an interpretive step that MSP has not challenged, EPA analyzed MSP's permit application in terms of the five factors articulated in paragraph thirteen and did not directly focus on the narrative criteria preceding the list of the twelve apostles. We note that the first of the five factors mimics the second of the narrative criteria and that both focus on whether a facility recovers energy or materials.

EPA denied MSP's permit application on the basis of its finding that MSP's kiln system met none of the five factors enumerated in paragraph thirteen.[1] In particular, EPA discussed extensively its grounds for finding that the majority of the hazardous waste processed by MSP contributed nothing to the production of a product and were not recovered or recycled, and therefore that MSP did not use thermal treatment to recover energy or materials. In addition, EPA found that MSP's kiln did not produce aggregate after defining aggregate according to commercial specifications.

The jury's findings covered only a portion of the industrial furnace inquiry considered in terms of either the narrative criteria and the twelve apostles or the five factors in paragraph thirteen. The jury found that MSP's rotary kiln was an aggregate kiln, and that MSP's kiln, oxidizers, and slag box were part of a system that produced aggregate. For whatever reason, the jury was not asked whether MSP uses thermal treatment to recover energy or materials. The interrogatories most analogous to the thermal treatment inquiry were questions 2 and 2(a), which asked the jury whether the hazardous wastes received by MSP were beneficially used or reused or legitimately recycled. The jury failed to reach a verdict on these interrogatories. Accordingly, EPA decided issues

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[1] Although the EAB affirmed Region VI's initial decision to deny the permit primarily upon the ground that MSP's kiln was not an aggregate kiln, it "recognize[d] that the Region based its decision on other grounds as well" and clarified that "to the extent we have not ruled on those other grounds, nothing in this decision should be construed as preventing the Region from basing its final permit decision on these other grounds." 1995 WL 135572, at *24. The final agency action of which MSP complains is Region VI's formal denial of its permit application. This denial makes clear that one of the bases of Region VI's denial was MSP's failure to meet the criteria stated above. MSP has not argued to this court that our review is limited to the grounds articulated in the EAB's decision.

that the jury did not, and collateral estoppel does not apply.

MSP seeks to avoid the force of this argument by contending that the jury decided whether MSP used thermal processes to recover energy or materials when it decided that MSP produced aggregate. This argument is structually identical to SWP's contention, which we rejected in *United States v. Marine Shale Processors, Inc.*, No. 94-30419, at 11, —— F.3d ——, ——, that producing a product is necessarily recycling, and we disagree for the same reason here. A reasonable trier of fact could find that, to the extent that MSP produced aggregate, it did so without recovering the energy or materials in the hazardous wastes that it accepted.

MSP's brief suffers from the assumption that the only issue in the permit application proceeding was whether its rotary kiln constituted an aggregate kiln. That assumption is incorrect. Not all aggregate kilns are industrial furnaces, as the narrative criteria of the definition of industrial furnace and the first of the five factors in paragraph thirteen make clear.[2]

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[2] We also reject MSP's implication that the district court's ruling that MSP had interim status as a BIF estopped EPA from denying the permit. Interim status is designed to last only until EPA rules on a permit application.

Because of our disposition of MSP's collateral estoppel argument on the grounds of lack of identity of the legal issues involved, we do not reach EPA's argument that the jury's findings cannot support collateral estoppel because they have not been incorporated into a final judgment. We note, however, the tension between the dictum in *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1295 (5th Cir. 1995), which suggests that jury findings are sufficient to support collateral estoppel even if the verdict has not yet resulted in a final judgment, and the holding of *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1272 (5th Cir.1986), which suggests that partial summary judgments are insufficient. Under Fed.R.Civ.P. 54(b), both jury findings and partial summary judgments are subject to revision before entry of final judgment. Even when, as here, a trial judge has rejected a motion for a judg-

III

MSP argues that EPA's findings of fact and conclusions of law were arbitrary and capricious. We do not agree.

We limit our review in this case to sections III.A and III.B of EPA's September 15, 1994 Statement of Basis for Denial of Permit Application by Marine Shale Processors, Inc. The findings of fact and conclusions of law included in these two sections are sufficient to uphold EPA's decision. Although we find none of EPA's findings of fact or conclusions of law in these two sections arbitrary, capricious, or contrary to law, we focus our discussion here on the evidence underpinning the finding that MSP's system does not use thermal processes to accomplish recovery of energy or materials and on certain determinations EPA made in deciding that MSP's material does not qualify as aggregate within the meaning of 40 C.F.R. § 260.10.

A

EPA's finding that MSP has not designed or used its facility to accomplish recovery of material products and thus that MSP does not use thermal treatment to accomplish recovery of materials or energy is not arbitrary or capricious. As our discussion will make clear, EPA's decisions are highly technical and scientific and are not readily susceptible to lay review. Most of these decisions are factual. We bear these considerations firmly in mind when considering MSP's request that we upset EPA's con-

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ment as a matter of law seeking to upset the jury's findings, Rule 54(b) provides that this rejection is itself subject to revision at any time before final judgment. We thus have some difficulty justifying a rule, if in fact it exists in this circuit, allowing issue preclusion to attach to jury verdicts but not to summary judgments, when neither has been incorporated into a final judgment. We do not seek to resolve this tension in this case.

Given our disposition of this case, we also do not reach EPA's argument that the different burdens of proof and nature of the proceedings precludes invocation of collateral estoppel.

clusions in an area in which Congress has chosen to trust the experts.

Throughout this section, we assume that MSP produces something its calls aggregate and that its kiln system is an integral component of the process for this aggregate's production. We focus entirely on the question of whether EPA could conclude that MSP does not use thermal treatment to accomplish recovery of materials or energy, or that the design and use of MSP's device is not primarily to accomplish recovery of material products.

1

EPA considered evidence that MSP processed quantities of "lab packs" containing wastes that could contribute nothing to the production of a product. The lab packs were packages of kitty litter and other absorbent material surrounding glass or plastic containers of toxic chemicals. For example, Dr. Douglas Kendall, an EPA chemist, used MSP's manifests and Material Characterization Data Sheets to determine that MSP processed sulfur, toluene solution, ammonium hydroxide, hydrochloric acid solutions and mixtures, nitric acid, and sulfuric acid. Dr. Kendall confirmed that these wastes do not release significant energy when burned and, because they react to form gases at high temperatures, could not provide bulk for MSP's product. EPA considered similar evidence regarding such materials as poisons, pesticides, other acids, and bases; specific substances included methylene chloride, trichlorotrifluoroethane, cholorform, perchloroethylene, trichloroethylene, nitric oxide, fluorotrichloromethane, pentachlorophenol, ethylenediamine, formaldehyde, carbon tetrachloride, and phosgene. MSP's experts could not specify how many of these substances contributed to a manufacturing process. MPS's handling of these substances also suggests that they contribute nothing to production. MSP employee Annika Keslick told EPA that MSP normally opened ten percent of these lab packs, and MSP's examination upon opening was limited to matching

the name on the glass or plastic container within the pack to the information contained on the MCDS or manifest.

EPA could find that MSP was not accomplishing recovery of energy or materials from these wastes. The composition of the wastes themselves did not allow their combustion to contribute to any production process, and we cannot understand how MSP could have recovered energy or materials from these wastes without sampling them to verify their contents. MSP's only defense of its treatment of the lab pack wastes is that the kitty litter and other packaging provide mass for its aggregate. EPA could conclude that this argument misconstrues the regulations and is wrong as a matter of law. One does not recycle hazardous waste by placing that waste into a container and then recycling the container.

MSP correctly points out that the lab packs constitute only around one percent of the total volume of wastes processed at its facility. Nevertheless, the amount of material is significant in absolute terms in that MSP process an average to three to four hundred of the lab packs per week, and MSP's cavalier treatment of these "feedstocks" gives us pause when we consider the remainder of MSP's claim that all of its wastes contribute in some way to its process.

2

EPA considered evidence that MSP processed large quantities of waste with metal contaminants that contribute in no legitimate way to any manufacturing process and thus that MSP's use of these wastes did not constitute recovery of energy or materials. The metallic composition of these wastes spanned the periodic table and included highly variable quantities of lead, barium, cadmium, iron, silicon, aluminum, manganese, copper, zinc, bromine, strontium, calcium, and chromium. MSP's kiln did not destroy these metals. The residue from the process of metal-bearing waste, which MSP calls primary aggregate, normally requiring slagging to reduce leaching potential.

MSP suggests that it used these metals for two purposes. First, all provide mass for the ultimate product. Second, some compounds from these metals had other properties useful to the manufacturing process or the ultimate product. Dr. Paul Queneau, a metallurgical engineer, told EPA that iron oxide and alumina and titanium are "chain formers, and they very much enhance the environmental stability of the slag." Other metallic oxides lower the melting point of the mixture and decrease its "melt viscosity."

EPA's disbelief of these justifications was not arbitrary or capricious. EPA scientists stated that the metal content of the waste necessitated slagging before the ultimate product could be legally placed on the ground and that the slagging process significantly reduced the mass produced. Dr. Terrance McNulty, an expert in extractive metallurgy, also provided evidence that many of these metals impeded production of the slag. Barium, for instance, which at times constituted fourteen to sixteen percent of the slag mass, impeded production because the high melting points of its compounds made liquification more difficult. Most importantly, EPA considered evidence suggesting that while many of the metal compounds do exhibit some of the desirable properties that Dr. Queneau identified, they do so only when present in certain concentrations. Chemist Stanley Wrobleski confirmed that Marine Shale made no attempt to control the metallic composition of its primary or slagged material and that metal concentrations varied widely. Moreover, EPA considered evidence such as a letter from Woodward-Clyde Consultants, MSP's primary environmental consultant, to George Eldredge, an MSP officer, stating that many of the metal compounds "are not introduced specifically or purposefully into the raw product in order to incorporate a particular physical characteristic into the product aggregate but are inherent elements of the raw materials used in the manufacture of

the aggregate."[3] Under such circumstances, EPA could conclude that MSP's process did not recover of these metal-bearing wastes or their metallic constituents.[4]

3

The largest percentage of MSP's wastes consists of soil contaminated by organic compounds. MSP contends that the soil provides raw material, or mass, for its aggregate and that the organic compounds release heat when burned.

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[3] Although this same letter concluded that "these elements are beneficial in enhancing the quality of the produced aggregate," it apears that this conclusion was based entirely upon the coincidence that "the majority of the elements of the produced aggregate are also the major constituents in some of the more common and select construction materials in use today." Nothing in this letter sought to match the concentration of metals in MSP's material to that in the more common and select construction materials. Marine Shale's argument would lead to the conclusion that any material containing sugar, butter, eggs, and flour is a cake.

[4] EPA warned the regulated community about this type of "use" of metallic compounds shortly after filing the lawsuit in this case.

> The Agency notes in addition that it ordinarily does not consider metal-bearing hazardous wastes to be used as ingredients when they are placed in industrial furnaces purportedly to contribute to producing a product. . . . To be considered legitimate use as an ingredient, it would normally need to be demonstrated to EPA (or an authorized State) pursuant to § 261.2(f) that the hazardous metal constituents in the waste are necessary for the product (i.e. are contributing to product quality) and are not present in amounts in excess of those necessary to contribute to product quality. This would normally require some demonstration that these hazardous metal constituents do not render the product unsafe for its intended use. (The other sham recycling criteria discussed frequently by EPA would have also to be satisfied). The types of uses of hazardous wastes in industrial furnaces to produce waste-derived products of which the Agency is aware, such as using hazardous wastes to produce aggregate or cement[,] . . . do not appear to satisfy these criteria.

Final Rule, *Burning of Hazardous Wastes in Boilers and Industrial Furnaces*, 56 Fed.Reg. 7133, 7185 (1991).

Accordingly, MSP argues that both the soil and the waste contribute to its aggregate production process.

EPA's rejection of these arguments was not arbitrary or capricious. EPA considered evidence that some of these wastes consisted of soil contaminated with pentachlorophenol, which it specifically labeled a low energy hazardous waste constituent. In addition, EPA could conclude that MSP's process generates heat far in excess of that needed to make its product. Ronald Corwin, an EPA expert witness, suggested that the vast majority of the heat MSP produced from its burning travels in non-contact cooling water through MSP's facility and out into Bayou Boeuf. While MSP correctly points out that no recycling process is one hundred percent efficient, EPA's assessment of whether this heat is used or wasted is a particularly technical judgment about the overall efficiency of MSP's process. We will not disturb this judgment in this case.

4

At oral argument, MSP strenuously contended that EPA's permit denial decision rested on the conclusion that EPA could reject the application if MSP burned a thimbleful of hazardous waste for destruction, and thus that EPA had imposed an unreasonable burden in requiring a potential BIF to prove that it was recovering every atom or every bit of heat from waste in order to claim entitlement to a BIF permit. We make no comment on this argument; this is simply not a thimbleful case. EPA has concluded that the overwhelming majority of MSP's wastes are burned for destruction, not used for recovery of energy or materials. The findings of fact and conclusions of law underlying these decisions are not arbitrary or capricious. EPA could conclude that to the extent that MSP produced a product, it did so in spite of the wastes it purported to recycle.

MSP's final attack on this analysis is that a focus upon recovery of energy or materials constitutes an analysis of the role that each material plays in the manufacturing process and of the purpose the particular facility serves. After the promulgation of the BIF regulations, MSP argues, a focus on purpose is improper. In particular, MSP quotes the EAB's statement that "we have serious doubts as to whether after promulgation of the BIF rule the purpose for which MSP is burning hazardous waste at the facility is relevant to the determinant of whether MSP's facility meets the industrial furnace definition." *In re Marine Shale Processors, Inc.*, Dkt. No. 06900009, RCRA Appeal No. 94-12, 1995 WL 135572, at *25, n. 32 (EPA 1995). MSP also notes that 40 C.F.R. § 266.100 establishes that the BIF rules regulate BIFs without regard to whether the particular facility is burning for destruction or is recycling.

MSP's argument fails to separate two analytically distinct issues and regulations. 40 C.F.R. § 260.10 governs whether a facility definitionally qualifies as a BIF. Once a facility has definitionally qualified as a BIF, 40 C.F.R. pt. 266 subpt. H governs most aspects of its operations, including burning for destruction. Although we note that some tension might arise if EPA were to interpret section 260.10's definition of BIF to exclude a facility that burns a thimbleful of waste for destruction, EPA has not done so here, as is made clear by EPA's focus on whether MSP uses its kiln system "*primarily* to accomplish recovery of material products." 40 C.F.R. § 260.10 (emphasis added). We cannot conceive of an interpretation of "to accomplish recovery of materials or energy" and other similar phrases in section 260.10 that does not focus on purpose.

An analysis of the preambles to the regulations defining BIFs supports our conclusion. In distinguishing between *boilers* and incinerators, EPA did seek to shift the initial

focus of the definitional inquiry from primary purpose to structural design. Thus, EPA considered and eventually adopted a definition of boiler depending on whether the facility "achieve[s] heat transfer within the combustion chamber itself, generally by exposing the heat recovery surface to the flame." Proposed Rule, *Hazardous Waste Management System: General,* 48 Fed.Reg. 14,472, 14,483 (1983); *see* Final Rule, *Hazardous Waste Management System; Definition of Solid Waste,* 50 Fed.Reg. 614, 626-27 (1985).[5] But EPA recognized that some facilities normally engaging in recycling lacked this distinguishing characteristic of boilers, and therefore chose to rely in part upon the primary purpose test in defining *industrial furnaces.* 50 Fed.Reg. at 626-27. Thus, the language of the rules and the preambles support our conclusion that EPA may interpret 40 C.F.R. § 260.10 to include a focus on the primary purpose of the facility or the role played by wastes processed within it.

B

We hold that EPA's refusal to label MSP's kiln an aggregate kiln was not arbitrary or capricious. MSP's primary attack upon this portion of EPA's reasoning is that EPA erred by narrowing its definition of "aggregate" to "commercial grade aggregate." In particular, MSP disputes EPA's reliance upon standards promulgated by the Louisiana Department of Transportation in reaching its decision that MSP's material does not constitute commercial grade aggregate. EPA's interpretations of its own regulations are entitled to substantial deference. *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). We find no error.

In making its adjudicative decision, EPA had to employ some set of standards to distinguish aggregate from any

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[5] Even in the boiler context, EPA used the integral design test as a proxy for discovering the primary purpose of the facility. *See, e.g.,* 50 Fed.Reg. at 626 ("The definition of boilers focuses on physical indicia of their legitimate use for energy recovery.").

material, like cigarette ash, capable of occupying space. The history of EPA's focus on recycling of hazardous wastes to produce a commercial product, as well as the use of commercial terms like "manufacturing" process and "industrial" furnace, suggests that EPA's decision to employ commercial criteria in its decision was reasonable at least.

EPA considered factual evidence from witnesses knowledgeable in the construction field that aggregate purchasers typically employ at least some specifications for the product they purchase. In addition, EPA heard evidence that a material must meet LaDOT specifications before the State of Louisiana will buy it for state construction projects and that many private commercial contractors adopt these specifications as well. In the face of this legal history, regulatory language, and factual evidence, we cannot fault EPA's choice to rely on common commercial specifications to define the term "aggregate kiln" in 40 C.F.R. § 261.10.

We also find nothing wrong with EPA's decision to consider LaDOT criteria as highly indicative, though not conclusive, of the content of common commercial specifications. MSP has proposed no alternative set of standards or definition. Federal courts give deference to an agency's interpretation of its own rules; under the circumstances of this case, however, we seriously doubt that such deference is necessary. We find no error in EPA's choice of legal standard.

Given EPA's legal interpretation of its own regulation, we find nothing arbitrary or capricious in its application of this interpretation to the facts at hand, and we refuse to upset its conclusion that MSP's material is not commercial grade aggregate. MSP concedes that its material, and substances made from it, could not comport with many of the LaDOT standards. In addition, MSP concedes that it conducts no tests at all on its material to determine strength, size, shape, specific gravity, absorb-

necy, durability, compaction, or texture. Although MSP presented expert studies suggesting that its slagged and primary material could be useful in the production of certain concrete and asphaltic products, other experts disagreed. The choice of which expert opinions to credit belongs to the EPA permitting staff. Like the Environmental Appeals Board, we are struck by the fact that MSP has never field tested any of the products that its experts testified might possibly be manufactured in part from its slagged and primary material and that none of MSP's product has ever been commercially used for these purposes. *In re Marine Shale Processors, Inc.*, Dkt. No. 06900009, RCRA Appeal No. 94-12, 1995 WL 135572, at *12 (EPA 1994). Under such circumstances, EPA's application of the law to the facts is not arbitrary or capricious.

IV

MSP continues its attack on the permit denial process by alleging that EPA's failure to insulate fully the personnel litigating the district court action from those participating in the permit denial process rendered the latter deficient under the Due Process Clause. MSP highlights the roles of two individuals, Dr. Allyn Davis and Ms. Terry Sykes.[6] We find no due process violation.

A

Dr. Davis was the Director of EPA Region VI's Hazardous Waste Management Division, which has oversight of both enforcement and permitting issues within Region VI. Dr. Davis referred MSP's facility to EPA's enforcement arm. He later made the initial determination that MSP should not receive a BIF permit. MSP also attacks Dr. Davis's adjudicative role on the grounds that

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[6] MSP also devotes a footnote to an allegation of misconduct by Mr. Steven Silverman, an attorney in EPA's Office of General Counsel, labeling him the "finalizer" of EPA's permit denial decision. This portion of MSP's argument lacks merit.

his deposition testimony showed that he had prejudged certain key issues.

We find nothing remarkable in Dr. Davis's role in the permitting process.

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

Withrow v. Larkin, 421 U.S. 35, 56, 95 S.Ct. 1456, 1469, 43 L.Ed.2d 712 (1975). In his depositions, Dr. Davis repeatedly testified that he had not prejudged issues, that his decisions were based on information available at the time, and that he had decided to refuse MSP's permit application after an unbiased review of the evidence involved in the case. The fact that Dr. Davis came to one conclusion based on some evidence did not at all prevent him from deciding the issue fairly when confronted with all the evidence. *See NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-37, 67 S.Ct. 756, 765, 91 L.Ed. 854 (1947) (holding that a hearing examiner's prior adverse ruling did not prevent him from adjudicating the same case on retrial even though the examiner's initial decision had been reversed for improper exclusion of evidence).

B

Ms. Sykes was one of the United States' attorneys in the enforcement action at pretrial and early in the trial itself. After Dr. Davis and permit staff determined initially that EPA should deny MSP's permit application and identified the grounds for that determination, Ms. Sykes wrote a draft of the findings of fact and conclusions of law that served as the basis for EPA's statement justify-

ing the permit denial. Permit staff official Elaine Taylor provided evidence that Ms. Sykes became involved only after the permitting branch had completed an exhaustive review of MSP's six volume application, after Dr. Davis had approved the staff recommendation to deny the permit, after the staff had identified the grounds for the refusal, and several months after Ms. Sykes resigned from the district court litigation team. EPA relied on Ms. Sykes because of the illness of another attorney.

Ms. Sykes' role in the process was less than ideal, and the EAB correctly labeled it a mistake in judgment. *In re Marine Shale Processors, Inc.*, Dkt. No. 06900009, RCRA Appeal No. 94-12, 1995 WL 135572, at *23 (EPA 1994). The question, however, is whether Ms. Sykes' role denied MSP due process. We think not.

Ms. Sykes "is entitled to the normal presumption of good faith that, in courts of law, government officials still enjoy, that must be refuted by well-nigh irrefragable proof." *Starr v. FAA*, 589 F.2d 307, 315 (7th Cir.1979); *see Schweiker v. McClure*, 456 U.S. 188, 195-96, 102 S.Ct. 1665, 1669-70, 72 L.Ed.2d 1 (1982). MSP's burden is to persuade us that the use of Ms. Sykes posed "such a risk of actual bias of prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. In this case, Ms. Sykes' made no decision at all. She had no power to decide whether to grant MSP its permit, nor did she have power over those making that decision. Her role consisted entirely of articulating the thoughts and decisions of others. Even if Sykes' mind were "irrevocably closed," *FTC v. Cement Institute*, 333 U.S. 683, 701, 68 S.Ct. 793, 803, 92 L.Ed. 1010 (1948), she had a small role in the decision making process.

MSP analogizes Sykes' role to that of a federal court law clerk and argues that our decision in *Hall v. SBA*, 695 F.2d 175 (5th Cir.1983), mandates reversal here.

In *Hall*, we remanded a judgment for a new trial because a magistrate judge used a law clerk who from previous experience possessed intimate knowledge of the facts of the case and who had previously written a letter to the defendants stating that she agreed with the plaintiff. *Hall* does not control our decision in this case for two reasons. First, *Hall* was a decision under 28 U.S.C. § 455, which governs judicial conduct. "As this and several other circuits have recognized, section 455 establishes a statutory disqualification standard more demanding than that required by the Due Process Clause." *United States v. Couch*, 896 F.2d 78, 81 (5th Cir.1990); *see also Dirt, Inc. v. Mobile County Commission*, 739 F.2d 1562, 1566 (11th Cir.1984) ("Although such an appearance of bias is clearly present in this case, the standards governing administraitve proceedings are far more relaxed than those controlling judicial hearings."). Second, the *Hall* law clerk was involved throughout the entirety of the trial; she wrote bench memoranda, administered the case until the end of litigation, and had daily informal access to the magistrate. The danger existed that her bias affected the decision itself. In this case, the record shows that EPA used Sykes only after unbiased staff had reached the tentative decision to deny MSP's permit and had identified the grounds for the denial, and that Sykes had no role in the process beyond providing a draft of the eventual findings of fact and conclusions of law.

By comparison, we note that district courts occassionally adopt wholesale the findings of fact and conclusions of law written by a victorious litigant. While we discourage this practice, we have never radically altered the standard of review in such cases, much less concluded that such an adoption results in a per se due process violation. *See Lewis v. NLRB*, 750 F.2d 1266, 1272 n. 5 (5th Cir. 1985); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314 n. 1 (5th Cir.1977) *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). We tolerate the occasional use of this device because of our trust that

district courts will closely examine the proposed findings and will carefully consider the objections and arguments of the opposing party. In this case, EPA formalized exactly this sort of review process. After Sykes wrote the proposed findings, EPA gave MSP an opportunity to criticize her work. MSP took full advantage of this opportunity by filing 18 boxes of argument. EPA's permitting staff then reexamined the findings and adhered.

These facts distinguish this case from *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994, 1009 (7th Cir.1980), upon which MSP principally relies. MSP does not allege that EPA failed to disclose the grounds for its decision, that prosecutorial staff sought to delay the timing of an adjudication in order to gain a tactical advantage, or that adjudicatory staff sought to force MSP to waive certain litigation defenses in return for favorable treatment on its permit application. It was the combination of all of these factors, together with the improper mixing of adjudiciary and prosecutorial staff, that concerned the Seventh Circuit in *Bethlehem Steel*.

We question whether the use of Sykes as a federal law clerk would have passed the muster under section 455, given our statement in *Hall* that "[e]very judge has suffered a change of heart after reaching a tentative decision. Much might happen during the research and writing to affect the decision. Until the decision was signed and rendered, it was *in pectore judicis*, subject to possible influence." 695 F.2d at 179. Nevertheless, the constitutional standard for agency adjudication is not as stringent, and we hold that EPA provided MSP due process of law in its review of the permit application.

V

MSP makes one final argument. It contends that EPA exceeded its statutory authority by basing the permit denial in part on MSP's poor history of compliance with environmental laws. We refuse to reach this argument.

We have upheld EPA's denial of MSP's permit on other grounds, and MSP does not argue that the inclusion of this alternative grounds for decision renders the permit denial infirm.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 90-1240

SECTION "H"

UNITED STATES OF AMERICA

versus

MARINE SHALE PROCESSORS, INC.

JURY INTERROGATORIES

1. Was MSP entitled to a recycler exemption from the requirement of a permit as an operator of an incinerator of hazardous wastes?

YES —— NO ——

GO ON TO QUESTION 2

2. Were all of the hazardous wastes accepted by MSP beneficially used or reused or legitimately recycled?

YES —— NO ——

If your answer to question No. 2 is "YES", skip question 2(a) and go on to Question No. 3.

If your answer to question No. 2 is "NO", answer the following question No. 2(a).

2(a). Were all of the hazardous wastes accepted by MSP prior to August 21, 1991, beneficially used or reused or legitimately recycled?

YES —— NO ——

GO ON TO QUESTION NO. 3

3. Was the material produced by MSP from Southern Wood Piedmont Company's waste a "product" produced for the general public's use?

YES ✔ NO ——

GO ON TO QUESTION NO. 4

4. Did the waste material received by MSP from Southern Wood Piedmont Company undergo a chemical reaction in the course of processing the material so as to become inseparable by physical means?

YES ✔ NO ——

GO ON TO QUESTION NO. 5

5. Was the material produced by MSP from waste other than Southern Wood Piedmont Company's waste a "product" produced for the general public's use?

YES —— NO ——

GO ON TO QUESTION NO. 6

6. Did the waste material received by MSP from waste other than Southern Wood Piedmont Company's waste undergo a chemical reaction in the course of processing the material so as to become inseparable by physical means?

YES —— NO ——

GO ON TO QUESTION NO. 7

7. Did any sample of material which was placed on the ground after going through the full MSP process leach the constituents indicated in excess of the levels indicated?

5.0 ppm lead	YES ✔	NO ——
1.0 ppm cadmium	YES ✔	NO ——

GO ON TO QUESTION NO. 8

8. Did materials in pile 108 leach the constituents indicated in excess of the levels indicated?

.37 ppm lead	YES ✔	NO ——
.51 ppm lead	YES ✔	NO ——
.094 ppm chromium	YES ✔	NO ——
.066 ppm cadmium	YES ✔	NO ——

GO ON TO QUESTION NO. 9

9. After January 29, 1990, did materials in pile 3 leach lead in excess of .51 ppm?

YES ✔ NO ——

GO ON TO QUESTION NO. 10

10. Is MSP's rotary kiln an aggregate kiln?

YES ✔ NO ——

GO ON TO QUESTION NO. 11

11. Are Oxidizers 1 and 2 aggregate kilns?

YES —— NO ✔

GO ON TO QUESTION NO. 12

12. Is MSP's slag box an aggregate kiln?

YES —— NO ✔

GO ON TO QUESTION NO. 13

13. Are the rotary kiln, Oxidizers Nos. 1 and 2, and slag box part of a kiln system that produces aggregate?

YES ✔ NO ——

DATE AND SIGN THIS FORM AND
RETURN TO THE COURTROOM

May 24, 1994 /s/ [Illegible]
Foreperson

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Docket No. 90-CV-1240

UNITED STATES OF AMERICA and
STATE OF LOUISIANA

-versus-

MARINE SHALE PROCESSORS, INC.,
RECYCLING PARK, INC., and
SOUTHERN WOOD PIEDMONT COMPANY

New Orleans, Louisiana

June 15, 1994

3:00 p.m.

VOLUME 2

DAILY COPY TRANSCRIPT OF JURY TRIAL

BEFORE THE

HONORABLE ADRIAN G. DUPLANTIER
UNITED STATES DISTRICT JUDGE

* * * *

There are a number of legal issues involved in determining whether these conclusions give interim status eligibility as a BIF (assuming compliance with other requisites) to MSP's facility pending final action on its BIF application.

These issues are as follows: First, the government argues that an aggregate kiln which is not a lightweight aggregate kiln is not entitled to interim status.

I had decided this issue earlier in favor of Marine Shale, essentially concluding that the regulation, which is 40 CFR 266.10, which defines industrial furnaces, refers to an "aggregate kiln," not a "lightweight aggregate kiln."

The other regulation in 40 CFR 266.103 grants interim status and refers back to the regulation which defines boilers and industrial furnaces. That reference back regulation states that boilers and industrial furnaces are entitled to interim status if they were in operation at the time the permit requirement went into effect, provided they comply with other stated requisites. For purposes of this discussion, we assume that the other requisites have been complied with.

On the issue of whether the aggregate kiln has to be a lightweight aggregate kiln, I fully recognize that there is some preamble language in which EPA discusses at length a "lightweight aggregate kiln." It is arguable that when they do this, EPA is interpreting the words "aggregate kiln" to be restricted solely to "lightweight aggregate kiln." And that is, in essence, what the government argues to me.

I realize it argues other things as well. However, I point out that you could equally argue that whatever restrictions are proposed in the preamble language concerning "lightweight aggregate kilns" apply only to lightweight kilns and not to other aggregate kilns. In other words, one could argue that the regulation itself speaks of aggregate kilns. The preamble language about lightweight aggregate kilns is restricted to lightweight aggregate kilns, not to other types of aggregate kilns.

In any event, I am absolutely satisfied that if the agency had wanted to restrict interim status entitlement to light-

weight aggregate kilns, it certainly knew how to do so, and would have done so. It knew how to spell the word "lightweight" in issuing the regulations.

For example, it exempted "lightweight aggregate kilns," but not all aggregate kilns, from certain requirements. I refer here to 40 CFR 266.102(e)(3)(iii).

As an aside, I think that citation beats even the Internal Revenue code.

Therefore, the restrictive interpretation urged by the plaintiff, the United States Government, that "aggregate means only lightweight aggregate," is either an unreasonable interpretation or it is legislative in nature in restricting the regulations, or it is both.

The second issue is that MSP argues that notwithstanding the jury's answer that the oxidizers and the slag box were not aggregate kilns, I should rule that they are as a matter of law, I decline to do that.

I note once again, as I said before in various stages of this litigation, that it is certainly arguable that there is no fact issue concerning any of these interrogatories. And this is, indeed, a close question. I conclude, however, that here, as often is the case, we are presented with mixed facts and legal issues, and I defer to the jury's conclusions.

The legal issues, of course, include the meaning of the terms used in the statute and regulations. For example, what does "aggregate kiln" mean? These legal issues are mixed with fact issues such as the facts involved in the method by which MSP operates its facility, the fact issue of whether the industry involved would consider this to be an aggregate kiln, et cetera.

I conclude, applying the regular test that has been repeated many, many times in appellate decisions, that there is sufficient evidence for a reasonable trier of fact to resolve the issues as the jury did.

To state it differently, after considering all the evidence and reasonable inferences therefrom, I conclude that a reasonable jury could arrive at the results which this one did with respect to Interrogatories 10, 11, 12 and 13.

The third and remaining issue is the legal effect to be given to the jury's answer. The effect which I give to the jury's conclusion that the rotary kiln is an aggregate kiln is to decide as a matter of law that the rotary kiln, as such, is entitled to interim status as a BIF notwithstanding that it is not a lightweight aggregate kiln. The last issue is whether the entire system, including the oxidizers, the slag box, which otherwise would be required to be permitted as incinerators, is entitled to interim BIF status as an aggregate kiln system. I have no difficulty concluding that each of these devices is an integral component of a manufacturing process; they are all essential to the production of MSP's slagged aggregate, whatever that slagged aggregate is, and whatever status it may be entitled to.

The real difficulty involved is whether the regulation which defines industrial furnaces as including "aggregate kilns" meant to confer interim status not only upon the kiln, but also upon other devices which would otherwise have to be permitted as incinerators if those devices are an integral part of a process involving an aggregate kiln.

As I have indicated in conferences with counsel both on and off the record, I have expressed significant reservations about MSP's contention on this issue. Only recently was my attention called to EPA's interpretation involving Giant Cement. See the memorandum dated August 11th, 1992 from the Deputy Director of the Office of Solid Waste concerning the "combined operation of the resource recovery kilns and cement kilns at Giant Cement Company", and the January 25, 1994 letter from the Chief of the RCRA branch addressed to Giant Resource Recovery Company. It is clear to me that in this instance EPA acknowledged interim BIF status with respect to a device which would otherwise be required to be permitted as a hazardous waste incinerator on the basis that the device was "operating in series with a cement kiln," and because it was an integral part of a manufacturing process.

I understand the argument which I hear today, and I concede that I looked at the submission only today during

oral argument from, I guess, the Region to Ms. Lowrance that lead to the initial memo. It seems to me that it makes no difference for purposes of the logic involved in the memo from the deputy director of the Office of Waste Management—did I get that right?

MR. BUCKHEIT: Office of Solid Waste.

THE COURT: Office of Solid Waste. What he was saying was "we will henceforth regulate otherwise incinerators as interim BIF's. Whether he was saying they don't need an incinerator permit, or whether he was saying simply "we are going to regulate them as if they are BIF's" the effect is the same. He said that because they were an integral part of the manufacturing process involving a cement kiln, and that they were operated in a series —his words—that they are part of a system, and they are, therefore, part of a BIF, and to be treated as such.

It is clear that in this instance the device would otherwise have been regulated as an incinerator. But, while regulations or interpretations of what a lightweight aggregate kiln is, I have heard nothing in the trial nor at any time that would indicate any reasonable basis for concluding that the slagged aggregate is lightweight aggregate.

What is the result of that failure to comply? I am not ready to rule at this time. My inclination is to follow the Third Circuit, which seems to say that if MSP is otherwise entitled to interim status and I have decided that the jury has decided that it is BIF, I have no right to terminate that status, that only EPA can do that in an agency process. And once that is done, it goes directly then to the court of appeal.

I am persuaded to that view because of the specific appellate review. The Third Circuit made clear that the revocation of interim status is like a revocation of a permit, and that can only be done by agency action. And that never gets into the district court. It goes right up to the court of appeal.

I have already spoken to the issue about the mystery involved and why this hasn't been done earlier if, indeed,

it is EPA's position, as their counsel have repeatedly stated to me, that during the three years which this application has been pending, it was, in fact, incomplete, inaccurate or false. I am also persuaded to that * * * * * * * *

* * * *

APPENDIX D

[Filed Jun. 15, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 90-1240

UNITED STATES OF AMERICA

versus

MARINE SHALE PROCESSORS, INC.

JUDGE DUPLANTIER (EDLA)
MAG. JUDGE AFRICK (EDLA)

JUDGMENT

Considering the jury's answers to interrogatories No. 3 and 4, and considering the Court's Reasons for Judgment this date expressly directing entry of judgment;

IT IS ORDERED, ADJUDGED and DECREED that all material produced by Marine Shale Processors, Inc. from Southern Wood Piedmont Company materials processed separately from other material satisfies all criteria of 40 CFR § 266.20(b) and corresponding Louisiana regulations, and, as such, is not subject to regulation as a hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C. § 9601, et seq., Part 40 of the Code of Federal Regulations, or any corresponding federal or Louisiana regulations.

Dated this 15th day of June, 1994.

/s/ [Illegible]
United States District Judge

[Filed Jun. 15, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 90-1240

SECTION "H"

UNITED STATES OF AMERICA

versus

MARINE SHALE PROCESSORS, INC.

REASONS FOR JUDGMENT

For the following reasons, as well as those stated on the record on June 1, 1994, I grant the motion of Southern Wood Piedmont Company (SWP) for entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on Count 1 of its Complaint of Intervention.

SWP's complaint in intervention alleges that "MSP has taken delivery of certain material from Piedmont (the 'Material') and, using its thermal process, has made a product from that Material (the 'Product')." The complaint in intervention also alleges that "[t]he Material is and at all times has been processed by MSP separately from material from other sources." Count 1 of the complaint seeks a declaration that the "Product" is not a "hazardous waste" and that the "Product" is "a 'product' within the meaning of 40 C.F.R. § 266.20(b) and is not required to be disposed of as a 'hazardous waste'." SWP's sole claim for relief under Count 1 relates to its material which was unmixed with any other generator's material prior to its exit from MSP's kiln.

The jury's answers to Interrogatories Nos. 3 and 4 fully dispose of all fact issues related to Count 1 of SWP's intervention. Those interrogatories address only the SWP material which exited MSP's rotary kiln without having been mixed with material from other sources. Any SWP material which was mixed with other waste material prior to exiting the kiln was no longer SWP's Count 1 material and therefore was not encompassed by Interrogatories Nos. 3 and 4. Interrogatory No. 3 addressed only "material produced by MSP from Southern Wood Piedmont Company's waste", not material produced from SWP's waste *and* other waste. "Mixed" material is not included in Count 1 of SWP's intervention, nor in Interrogatories Nos. 3 and 4. Because the jury reached no verdict as to Interrogatories 5 and 6, there has been no determination that such "mixed" material is a "product".

Count 1 of SWP's intervention is one of many claims for relief presented in this action. Because there is no just reason for delay in entering judgment on that claim, I expressly direct entry of judgment in favor of SWP on Count 1 of its complaint in intervention. Fed. R. Civ. P. 54(b).

June 15, 1994 /s/ [Illegible]
United States District Judge

APPENDIX E

[Filed Jun. 20, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 90-1240

SECTION "H"

UNITED STATES OF AMERICA, *et al*

VS.

MARINE SHALE PROCESSORS, *et al*

ORDER AND REASONS: MOTIONS FOR JUDGMENT UNDER RULE 54(b)

The United States has moved for judgment as a matter of law as to its Count One claim; MSP has moved for judgment on the same count, based upon the partial verdict of the jury, and SWP has moved for judgment on the counterclaim of the United States against it, also based upon the partial verdict of the jury. For the reasons assigned orally at the hearing on June 15, as hereby supplemented, I DENY all such motions.

Stripped of regulatory "fuzz", the government's Count One claim is that MSP should be enjoined from further operation essentially on two bases:

(1) MSP is not and never has been a legitimate recycler, and therefore must have a permit as an incinerator of hazardous wastes, which it never has had.

(2) Conceding, *arguendo*, that MSP is a legitimate recycler, subsequent to August 21, 1991, the effective date of the BIF permit requirement, MSP is in violation of RCRA because it does

not have a BIF permit nor interim status as a BIF.

Prior to the BIF permit requirement, a facility which burned hazardous waste was required to have an incinerator permit, unless it was exempt therefrom as a recycler, in which case it needed no permit. When the BIF permit requirement became effective, the only change was that recyclers who until then needed no permit were required to obtain a BIF permit. Recyclers were granted interim status as a BIF pending processing of their BIF permit applications.

What complicates the analysis required to dispose of the pending 54(b) motions is the method by which EPA chose to grant interim BIF status: it listed twelve types of operations in 40 C.F.R. 260.10 (which we have dubbed the "twelve apostles"), which EPA considered as engaged in legitimate recycling of hazardous wastes. Apparently conceding that it was not omniscient, EPA included in the "twelve apostles" section a provision that other operations could be added to the list under certain circumstances, and thereby be granted interim status. Government counsel have suggested that this procedure cured the problem created for a lawful recycler whose operation was not listed among the twelve. What it did not cure was his status pending action upon either his BIF application or his request to be added to the list of twelve. Either action could take several years, based upon the backlog of other similar matters pending before EPA. The regulation (40 C.F.R. 260.10) conceded the possibility that there may exist a legitimate recycler who was not included on the "apostle" list. However, such a legitimate recycler would be effectively precluded by 40 C.F.R. 225.103(a) from doing business until his membership application was acted upon. It is doubtful that the right to continue business as a recycler without a permit, certainly a valuable property right, could be taken away, even temporarily, by simply not including that recycler on the list of twelve, with no opportunity for a hearing. In this particular case, that issue is removed by the jury's answer to Interroga-

tories 10 and 13 and the legal effect which I have given thereto: interim status. I observe parenthetically the fundamental principle that statutes and regulations should be construed, if possible, in a manner which avoids constitutional issues.[1]

EPA could have taken a much simpler and, I submit, more sensible approach by granting interim BIF status to any operator, including MSP, which, prior to the effective date of the BIF permit requirement, claimed the right, as a recycler, to operate without a permit. This would have left the determination of recycler status to the BIF permit process, which has involved delays of several years. Instead, EPA limited interim status to the "twelve apostles" and any others who might be added later. Moreover, EPA apparently equates BIF status, interim or by permit, to lawful recycler status. If one accepts that equation, then every reference to interim status in my oral reasons at the June 15 hearing would have to be changed. Instead of interim BIF status, MSP would be entitled only to have its system and all of its components declared to be an industrial furnance as an aggregate kiln within Section 260.10. The anomaly is that Section

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[1] Unless every legitimate recycler upon whom the new BIF permit requirement was imposed is given interim status pending a decision on its BIF application, there may be a constitutional problem involved. Assuming that MSP was a legitimate recycler before the BIF permit requirement went into effect, if it is not given interim status as a BIF applicant, it is effectively shut down until the government acts on its BIF permit application. My "knee-jerk" reaction is that this would be unconstitutional. I do not think that the government can regulate business activity in this fashion. I recognize that it can criminalize conduct which was previously not criminal and effectively prohibit repetition of the conduct. However, it is doubtful that the government could constitutionally impose a permit requirement upon activity which previously did not need to be permitted and prohibit the business from continuing that activity pending a lengthy permit process. This is what would happen if we assume *arguendo* that MSP was legitimately recycling before the BIF permit requirement was imposed and if, because its aggregate kiln system was not included within the "twelve apostles", it is denied interim status.

260.10, read with Section 266.103(a), confers interim BIF status on the listed operations. In my view, BIF interim status does not equate to legitimate recycler status. Conferring of interim BIF status simply permits an operator to continue to operate without a BIF permit pending action upon his BIF application. If that operator was not a legitimate recycler before acquiring interim BIF status, it remains unlawful.

I conclude that interim BIF status can be and has been granted to operators such as MSP who claim to be recyclers but who in the permitting process may be denied a BIF permit because EPA determines that they are not lawful recyclers.

None of the foregoing says anything about the contention of the United States that MSP is not and never has been a lawful recycler, nor has the jury spoken to that issue. Because that contention is one of the bases for the government's claim that MSP is operating without a required RCRA permit, the conclusion that MSP is entitled to interim BIF status does not dispose of that claim against MSP or of the government's counterclaim against SWP.

THE GOVERNMENT'S MOTION

The government claims that it is entitled to a 54(b) judgment on Count One, based upon its contention that, even if MSP achieved BIF interim status, it forfeited that status because of a faulty BIF application. I remain convinced, as I indicated in my June 15 oral reasons, that the decision of the Third Circuit, *Vineland Chemical Co., Inc. vs. United States Environmental Protection Agency*, 810 F.2d 402 (3rd 1987) is correct and that its reasoning applies here. If MSP achieved interim BIF status, that status can be revoked by reason of an application violation only by administrative agency action, appealable to the Circuit Court of Appeals.

June 20, 1994 /s/ [Illegible]
United States District Judge

The above observation lends support to the conclusion that the list in 40 CFR 260.10 should be interpreted broadly so as to encompass all legitimate recyclying activity which was being conducted at the time that the BIF permit regulation went into effect. The purpose of the new regulation was simply to impose BIF permit requirements upon legitimate recyclers. EPA should not be able to shut down a legitimate recycler until EPA has processed its BIF application. There may be reasons for denying a BIF permit, including sham recycling, but this would be done only after due process.

Therefore, it may be of no consequence how the jury answered Interrogatories 10 through 13. The only real issue concerning interim BIF status may be whether Marine Shale was a legitimate recycler before the BIF regulation went into effect.

APPENDIX F

[Filed Aug. 30, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Civil Action No. 90-1240

SECTION "H"

UNITED STATES OF AMERICA

versus

MARINE SHALE PROCESSORS

ORDER AND REASONS

Sua sponte, I reconsider the Order and Reasons dated July 29, 1994, insofar as I granted summary judgment to plaintiffs on their claim with respect to storage of F wastes. For the following reasons, I deny plaintiffs' motion for summary judgment as to that claim and grant MSP's motion for summary judgment on plaintiffs' storage claims insofar as it relates to F wastes.

I have struggled mightily for nearly a year to understand the logic behind many of the regulations and agency interpretations involved in this litigation. Over twenty-five years of a quite active law practice and over twenty years of a quite active judicial career have availed me little in this struggle. I have attempted unsuccessfully to discern some pattern in the regulatory scheme.

I previously rejected MSP's contention that it has interim status to store F and K wastes by virtue of its January 6, 1986, permit application to store U and D wastes and its amendment thereto dated January 31, 1986, add-

ing F and K wastes. In rejecting that contention, implicitly, if not explicitly, I determined that EPA's interpretation of its own regulation [1] (identical for our purposes to the state regulation at issue)[2] and the state's own interpretation manifested by LDEQ's written pronouncements confirming MSP's interim status were unreasonable. During the period since the last hearing on remedy and the most recent conference with counsel, I have re-read the various memoranda on this issue as well as jurisprudence concerning the deference due to agencies' interpretations of their regulations and have attempted to discern the reasoning behind the interpretations which I rejected.

I now conclude that it is not unreasonable for EPA to acknowledge interim status for storage of any regulated hazardous waste for a facility which has obtained interim status to store some other regulated hazardous waste. As applied to the situation involved in this case, it is not unreasonable for EPA and LDEQ to interpret the regulations governing "changes during interim status" in the following manner: MSP, having obtained interim status to store D and U wastes by filing the January 6, 1986 permit application also secured interim status to store regulated wastes which it had not previously stored, such as F wastes, by simply amending its January 6, 1986 application. Because MSP began to store F wastes only after it filed a Part 1 storage application for D and U wastes and an amended application to store F wastes, it satisfies the requirements of the regulation as so interpreted.

My conclusion that the regulatory interpretation is not unreasonable is based on two significant points. First, an operator who has achieved interim status to store hazardous wastes is bound by all of the regulations concerning the storage of those wastes; thus, there seems to be little serious objection to permitting that operator to store wastes previously regulated (but not handled by that

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[1] 40 C.F.R. § 122.23(c)(1).

[2] LHWR 23.2(a).

operator) as well as those newly added to the list, pending processing of its application for a permit. Second, if the regulatory agencies are concerned about the operation of any interim status storage facility, the agency can either take action to terminate status or expedite the application and if necessary deny the permit, either of which can be done promptly.

The foregoing has no effect upon my conclusion that plaintiffs are entitled to summary judgment against MSP for storage of K wastes without a permit because MSP lacked interim status for K storage. LHWR 23.2(a) and its federal counterpart 40 C.F.R. § 122.23(c)(1) do not apply where, as here, a facility stores a regulated waste at a time when it lacks interim status to store any waste. MSP stored regulated K wastes beginning in July 1985, prior to filing its Part 1 storage application. Thus, MSP's storage of K wastes does not fall within the regulation's window of opportunity for interim status offered for previously regulated wastes.

In reaching the foregoing conclusion, I have not overlooked the government's argument that MSP is not entitled to interim status to store any wastes because it was a storage violator prior to filing its application to store D and U wastes. Finding no statutory or regulatory basis for that contention, nor logic to support it, I decline to follow the one district court decision to that effect. *Sierra Club v. Chemical Handling Corp.*, 1992 U.S. Dist. Lexis 21791 (D. Colo. 1992). It is unreasonable to suggest that an operator who has once violated a regulation is thereafter precluded from ever lawfully operating. One could argue with equal force that any permittee who violates an environmental regulation would as a result lose his permit, a position never advocated by EPA or LDEQ.

There is no reason for delay in entering judgment on behalf of defendant on the plaintiffs' claim with respect to storage of F wastes; I expressly direct entry of judgment on said claim.

My minute entry dated August 8, 1994, dealt with F and K wastes jointly and determined that there were 1520 storage violations. It is now necessary to determine the number of violations for storage of K wastes. I use the same methodology employed in the August 8, 1994, minute entry. I have excluded all violations which occurred in 1985, the period covered by the criminal bill of information for which a fine has already been imposed and paid. Commencing with violations occurring in 1986, I conclude that there are 354 violations.

In reaching this conclusion I note that there was no evidence that wastes were ever fed into the kiln either directly from the transport vehicle or after only a brief period of containment in an MSP tank for the purpose of conveyance to the kiln. If there were such evidence, those days would not be counted as violations. "Storage does not necessarily begin the instant that wastes are unloaded from the transport vehicle and placed in some form of containment. I interpret the term "storage" in RCRA as excluding a reasonable period of time between the unloading of the wastes and their placement in the kiln.

August 30, 1994.

/s/ [Illegible]
United States District Judge

APPENDIX G

[Filed Aug. 30, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 90-1240

SECTION "H"

UNITED STATES OF AMERICA, *et al*

VS

MARINE SHALE PROCESSORS, INC., *et al*

JUDGMENT ON MAIN DEMAND: CLEAN AIR ACT, CLEAN WATER ACT, STORAGE OF "F" AND "K" WASTES AND LAND BAN VIOLATIONS

JUDGMENT ON COUNTERCLAIM AGAINST SOUTHERN WOOD PIEDMONT COMPANY

Considering the court's directions as to entry of judgment and the oral reasons therefor at the conclusions of the trials before the court without a jury on July 7, 8, and 11, 1994, and August 15 and 16, 1994, on the claimed violations of the Clean Air Act and Clean Water Act, and on the counterclaim against Southern Wood Piedmont Company, and further considering the order granting plaintiffs' motion for summary judgment on liability regarding storage of K wastes and land ban violations, entered on July 29, 1994, the order related thereto

entered on August 8, 1994, the order entered this date granting defendant's motion for summary judgment on the storage of F wastes and directing entry of judgment thereon, the order entered this date assessing fines, and the trial on remedy on August 15, and 16, 1994,

And further considering the court's minute entry dated August 18, 1994, expressly directing the entry of judgment as to each of these claims;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment as follows:

CLEAN AIR ACT

In favor of defendants, Marine Shale Processors, Inc. and against plaintiffs, the United States of America and the State of Louisiana, dismissing the United States' Tenth Claim for Relief for alleged exceedances of Permit 1036 M-1, without prejudice to state court or administrative enforcement action.

In favor of defendant Marine Shale Processors, Inc. and against plaintiffs the United States of America and the State of Louisiana dismissing the United States' Eleventh Claim for Relief.

In favor of plaintiffs, the United States of America and the State of Louisiana and against defendant Marine Shale Processors, Inc., upon the United States' Ninth Claim for Relief in its Second Amended and Supplemental Complaint:

> (a) Ordering Marine Shale Processors, Inc to pay a civil penalty to the United States of America and the State of Louisiana in the amount of $3,500,000 for violations of the Clean Air Act, with interest thereon from date of judgment at the rate provided by law, all payments on said fine to be apportioned 50% to the United States and 50% to the State of Louisiana.

(b) Permanently enjoining Marine Shale Processors, Inc. from:

(1) causing, suffering, or permitting emissions from its facility that are not authorized by a Major Source permit duly issued pursuant to the Prevention of Significant Deterioration provisions of the Clean Air Act, §§ 160-167, 42 U.S.C. §§ 7470-7479 and regulations promulgated thereunder, or a federally enforceable Minor Source permit that restricts Marine Shale Processors, Inc.'s emissions such that the facility is not a Major Source; and

(2) operating, or using for storage, treatment, or blending of any waste, feedstock, fuel, ash or aggregate, any miscellaneous unpermitted source of air emissions including but not limited to tanks or barges.

This injunction is STAYED during the pendency of any appeal by defendant from that part of this judgment granting this injunction or until further order of the court on motion of plaintiffs based upon action concerning MSP's air quality permit applications.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that during the period that this injunction is stayed, Marine Shale Processors, Inc. shall comply with the following interim terms and conditions of operation until further order of the court:

1) MSP shall comply with the following emission limitations:

NOx 63 pounds per hour on a 1 hour rolling average, and further limited to no more than 19.5 tons per rolling thirty day period.

SO2 53 pounds per hour on a 1 hour rolling average, and further limited to no more than 18 tons per rolling thirty day period.

HCl 100 pounds per hour on a 1 hour rolling average, and further limited to no more than 32 tons per rolling thirty day period.

CO 40 pounds per hour on a 1 hour rolling average basis.

HC 9.9 pounds per hour on a 1 hour rolling average basis.

TSP Particulate emissions shall not exceed 9.5 pounds per hour on a rolling 1 hour basis.

2) MSP shall comply with the limits set forth above within 30 days of the entry of this Judgment, except for the limits applicable to HCl and SO2. MSP shall comply with the limits for HCl and SO2 within 120 days unless the Court, for good cause shown, allows MSP additional time for the engineering and construction necessary as set forth in paragraph (3) below relating to removal of baghouse dust from the system.

3) MSP shall within 120 days undertake the necessary engineering and construction to effectuate the removal, on a monthly basis of baghouse dust from the system for disposal in an appropriate landfill.

4) MSP shall report the operational parameters that are recorded by the Bailey computer to the United States Environmental Protection Agency and LDEQ on a monthly basis Such data shall be submitted in an IBM PC compatible format that is acceptable to the parties.

5) Within 30 days of entry of this Judgment, MSP shall retain at its expense an impartial environmental consultant, acceptable to the EPA and LDEQ (such acceptance not to be unreasonably withheld), to have access to the data provided pursuant to paragraph (4) above,

and who will, for one week a month, monitor MSP's operations and confirm the accuracy of the data being collected and submitted to EPA and LDEQ, and otherwise monitor MSP's compliance with all environmental regulations including, but not limited to, the Clean Air Act, the Clean Water Act, and the management of F and K wastes, in accordance with the terms and conditions set out in this Judgment.

6) Within 30 days of the entry of this Judgment, MSP shall submit to EPA and LDEQ for their review and approval enforceable protocols for determining the accuracy of the CEMS used to determine compliance with this order. Such protocols shall include provisions relating to calibration, scaling, operational readiness, redundancy, precision and accuracy.

7) MSP shall take appropriate engineering measures within 60 days to render physically impossible any voluntary bypass of the facility's baghouses such that particulate matter is emitted to the atmosphere.

CLEAN WATER ACT

In favor of plaintiff, United States of America, and against defendant Marine Shale Processors, Inc., upon the United States's Seventh and Eighth Claims for relief in its Second Amended and Supplemental Complaint:

(a) Ordering Marine Shale Processors, Inc. to pay a civil penalty to the United States of America in the amount of $3,000,000 for violations of the Clean Water Act, with interest thereon from date of judgment at the rate provided by law.

(b) Permanently enjoining Marine Shale Processors, Inc. from discharging pollutants from its facility except as authorized by a valid NPDES permit.

This injunction is STAYED during the pendency of any appeal by defendant from that part of this

judgment granting this injunction or until further order of the court on motion of plaintiffs based upon action concerning MSP's NPDES permit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that during the period that this injunction is stayed, Marine Shale Processors, Inc. shall comply with the following interim terms and conditions of operation until further order of court:

(1) Subject to Paragraph (2) below, MSP shall comply with the discharge limits proposed by in its January, 1991, NPDES permit application. The sampling location for each outfall shall be such that stormwater discharges are not commingled with water from Bayou Boeuf or fire protection water;

(2) MSP has represented, and the United States has agreed, that MSP must construct a stormwater treatment plant in order to comply with the limits ordered herein. MSP shall install the necessary facility as quickly as possible, and be prepared to justify, 90 days hence, any further extension for the enforcement of permit limits proposed by MSP in 1991 of time beyond 90 days from the date of entry of this Order.

(3) For all parameters other than heat, MSP shall also identify and thereafter utilize a measuring point for determining compliance with limits ordered herein for the effluent from outfall 002, that is upstream of any dilution.

(4) The discharge from outfall 002 shall not exceed 100 degrees F, on an instantaneous basis. MSP shall maintain complete records of the source, prior use and quantity of any water used to reduce the temperature of cooling water prior to discharge to the Bayou and shall pro-

vide a copy of such records to EPA on a monthly basis. MSP shall continuously monitor the temperature and discharge rate of cooling water, after mixing with other water to reduce its temperature, but upstream of any influence of water in Bayou Boeuf.

STORAGE OF F AND K WASTES

In favor of plaintiffs United States of America and the State of Louisiana and against defendant Marine Shale Processors, Inc., upon the United States' Fifth Claim for Relief in its Second Amended and Supplemental Complaint, as to K wastes:

(a) Ordering Marine Shale Processors, Inc. to pay a civil penalty in the amount of $1,000,000 for violations of Section 3005(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6925(a), LHWR Chapter 3.2(h) and LAC 33.V.303.B (1990), with interest thereon from date of judgment at the rate provided by law, all payments on said fine to be apportioned 50% to the United States and 50% to the State of Louisiana.

(b) Permanently enjoining Marine Shale Processors, Inc. from storing K wastes at its facility in any tanks, barges, or other containers except as authorized by a valid RCRA storage permit.

This injunction is STAYED during the pendency of any appeal by defendant from that part of this Judgment granting this injunction.

In favor of defendant Marine Shale Processors, Inc. and against plaintiffs United States of America and the State of Louisiana upon the United States' Fifth Claim for Relief in its Second Amended and Supplemental Complaint, as to F wastes, dismissing said claim.

LAND DISPOSAL OF CHARACTERISTIC WASTES

In favor of the plaintiff United States of America and against defendant Marine Shale Processors, Inc., upon the United States' Third Claim for Relief ordering Marine Shale Processors, Inc. to pay a civil penalty to the United States of America in the amount of $500,000 for violations of Section 3004(d) of the Resource Conservation and Recovery Act, 42 U.S.C. 6924(d), with interest thereon from date of judgment at the rate provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that prior to MSP filing a notice of appeal in this action and during the pendency of any stay granted, MSP shall not disburse funds to or on behalf of its shareholders by way of dividends, royalties, loans, debentures or otherwise, except as follows: (1) The normal salaries which have been paid to Mr. John M. Kent, Sr. and Mr. John M. Kent, Jr. for services to MSP, may continue to be paid, without increase, during the period of the stay; (2) MSP may create a reserve on its books which will reflect the royalties due and payable to Mr. John M. Kent, Sr., which reserve shall be conditioned so that no monies may be disbursed unless and until all financial obligations under this judgment are satisfied and said disbursement is approved by the court, and (3) MSP may make disbursements to shareholders for the purpose of payment of MSP's local, state and federal taxes.

MSP shall not engage in any extraordinary disbursement which may impair its ability to satisfy any judgment which may be obtained by the United States without providing 15 days prior notice to the parties.

COUNTERCLAIM AGAINST SOUTHERN WOOD PIEDMONT COMPANY

In favor of plaintiff United States of America and against defendant Southern Wood Piedmont Company, upon the United States' Counterclaim, ordering Southern Wood Piedmont Company to pay a civil penalty to the United States of America in the amount of $25,000 for violations of Section 3002(a)(5) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6922(a)(5), with interest thereon from date of judgment at the rate provided by law.

August 30, 1994 /s/ [Illegible]
United States District Judge

APPENDIX H

[LOGO]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

STATEMENT OF BASIS FOR DENIAL OF PERMIT APPLICATION BY MARINE SHALE PROCESSORS, INC.

September 15, 1994

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STATEMENT OF BASIS FOR DENIAL OF PERMIT APPLICATION BY MARINE SHALE PROCESSORS, INC.

I. SUMMARY OF THE DECISION

In April 1992, Marine Shale Processors, Inc. ("MSP") submitted a six-volume permit application to the U.S. Environmental Protection Agency, Region 6 ("EPA"). The application was filed pursuant to the Resource Conservation and Recovery Act's ("RCRA") Boiler and Industrial Furnace ("BIF") regulations at 40 C.F.R. Part 266. MSP is seeking to operate as an industrial furnace, specifically, an aggregate kiln. EPA has determined that it will deny the permit application because MSP does not meet the definition of aggregate kiln and, therefore, does not meet the definition of industrial furnace at 40 C.F.R. § 260.10.[1] As a result, because the MSP facility treats hazardous waste in an enclosed device using controlled flame combustion, but does not meet the definition of an industrial furnace or a boiler, the facility is an incinerator subject to regulation under 40 C.F.R. Part 264, Subpart O.[2] In addition, MSP operates oxidizer units at the same facility in which hazardous waste is directly burned. These units are not an enumerated type of industrial furnace and consequently are subject to regulation as incinerators. Finally, EPA denies the permit application because of the

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[1] EPA issued a proposed denial of MSP's BIF permit application on January 31, 1994. The Statement of Basis For Proposed Denial of Permit Application by MSP is hereby incorporated into this document by reference.

[2] *See* 40 C.F.R. § 260.10 definition of incinerator. The State of Louisiana has been delegated the authority by EPA to issue or deny incinerator permits under the State's authorized hazardous waste regulatory program. The BIF regulations were promulgated pursuant to the Hazardous and Solid Waste Amendments of 1984 ("HSWA") to the Resource Conservation and Recovery Act. Because Louisiana has not yet been authorized to enforce HSWA regulations, issues regarding the granting or denial of BIF permits for facilities located in Louisiana are properly before EPA.

company's history of misrepresentation and noncompliance with environmental permits and regulations.

EPA notes that since June, 1990, it has been involved with MSP in litigation regarding, in part, whether MSP's combustion of hazardous waste constitutes legitimate recycling or incineration. The civil enforcement trial on this issue recently concluded without the jury being able to reach a verdict on the issue of whether MSP is a sham recycler. Contrary to intimations in MSP's short written comment in this proceeding, the Agency does not regard the inconclusive trial as in any way foreclosing its ability to reach a final determination on the permit application, or obviate the need to do so.

First, the jury failed to resolve the central issue of whether MSP had carried its burden of proving that it is recycling legitimately, i.e. that it is not incinerating hazardous waste. The jury's finding with respect to the wastes that MSP receives from Southern Wood Piedmont applies only to those wastes when managed in isolation. This jury finding thus affects, at most, a very small percentage of the hazardous wastes that MSP burns.

Second, the District Court entered no judgments on key issues in the case that are common to the civil enforcement action and this permit proceeding. With respect to rulings made by the District Court, the Court declined to issue jury instructions with respect to two of the so-called sham recycling criteria (those relating to revenues and to contributions to recycling made by hazardous constituents in hazardous wastes) which EPA has indicated are relevant to the issue of whether an entity is destroying the waste by incineration or whether the waste is recycled. The Court did not dispute the relevance of these criteria (given that evidence on these issues was admitted, and the inference that this evidence allowed a finding of sham recycling was argued by the government to the jury), but, in declining to issue jury instructions, evidently viewed the criteria as binding tests. They are not binding tests. EPA

does, however, continue to view them as relevant criteria and is so indicating in this document. The Court also declined to set aside a jury finding with respect to MSP's hazardous waste-fired oxidizers. The Court's action was based on a misunderstanding of a particular EPA document. EPA's Director of the Office of Solid Waste has issued a public memorandum clarifying how EPA's regulations apply and thus, is correcting a misinterpretation the Court has made in its reading of that earlier document. Accordingly, EPA believes as a matter of law under the applicable rules, the hazardous waste-fired oxidizers are not industrial furnaces.

EPA notes that the civil enforcement proceedings have established that MSP has committed significant and persistent violations of all of the major federal environmental laws. This suports EPA's determination to invoke its RCRA section 3005(c)(3) omnibus authority to deny MSP's permit application.

Finally, EPA rejects MSP's suggestion that the civil enforcement action somehow "obviates" the need to process this permit application. Determining whether or not to issue permits is the statutorily-delegated means of assuring whether and how hazardous waste management facilities are capable of complying with applicable regulations to assure that their operations are conducted so as to protect human health and the environment. This is the Agency's paramount task, which it is fulfilling here.

II. BACKGROUND

A. Description of the MSP Facility

According to MSP's BIF application, the MSP facility presently consists of a rotary kiln (PK-1), followed by two hazardous waste-fired oxidizers (called #1 and #2), a vitrification furnace, a wet scrubbing system with dry lime capability (also called oxidizers #3 and #4), a baghouse, and an emissions stack (the transition section passing between the bottom of oxidizers #1 and #2 is called

the vitrification furnace). MSP claims the kiln is an "aggregate manufacturing kiln."

Rotary kiln PK-1 is 275 feet long and has been in operation since 1985 (another kiln, called PK-2 exists but is not in operation). The PK-1 unit was previously used by the Pelican Lime manufacturing facility to produce hydrated and quicklime before the facility was purchased by MSP. In the BIF application, MSP proposed to begin operation of PK-2 and build four additional rotary kilns for a total of six kiln units.

In kiln PK-1, MSP introduces virtually every hazardous waste regulated under RCRA, as well as solid wastes such as oil field drilling wastes and household hazardous wastes. MSP is capable of receiving offsite wastes by truck, rail, or barge. Liquid hazardous wastes are delivered to tanks that feed the waste into the rotary kiln and oxidizers #1 and #2. MSP claims that these liquid wastes replace or supplement natural gas as the fuel for the kiln and oxidizers. Non-liquid wastes are placed in mixing tanks which consist of barges placed below ground surface. The wastes are then mixed with a backhoe and fed to the rotary kiln by a conveyor belt or drag chain conveyance system.

The non-liquid wastes are not mixed to any particular specification; that is, MSP has no "formula" or "recipe" when it solicits, accepts, mixes, or introduces the waste materials into the kiln or oxidizers. Furthermore, waste materials are the exclusive "feedstock" in the MSP process. MSP does not introduce materials such as soil, sand, gravel, or clay into the rotary kiln unless these materials are contaminated with hazardous wastes. For example, MSP accepts for disposal in the rotary kiln large quantities of soil contaminated with creosote from the cleanup of wood-treating facilities.

Waste materials introduced into the rotary kiln are exposed to temperatures ranging between 1600 F to 2500 F. The waste material residence time averages two to two

and one-half hours before exiting the kiln at the lower, fired end. MSP refers to the material exiting the kiln as "primary aggregate". A sample of the "primary aggregate" is tested, by means of the TCLP test, to determine the level of metals remaining in the material. In the past, the "primary" materials were tested to determine if they exceeded characteristic hazardous waste levels for various metals. Recently, however, the facility has decided to test the "primary" material to determine whether it contains concentrations of metals exceeding the lowest land disposal restriction ("LDR") treatment standards for the wastes accepted by MSP. If the material "passes" these tests, it is declared a "product" and sent to onsite, unprotected storage piles.

If the material does not pass these tests, it is placed in the vitrification furnace through an opening in oxidizer #2. Radiant heat from the rotary kiln, the oxidizers and several natural gas fired "oxygen lances" located in the transition section provide the energy to render material into a molten state inside the vitrification furnace. Solids collected from the wet scrubber systems (oxidizers #3 and #4) and excess filter cake removed from the baghouses are also introduced into the vitrification furnace in an attempt to entrain the heavy metals present in these materials into the final slagged material that exits the furnace.

Material exits the vitrification furnace near the bottom of oxidizer #1 into a series of two heated "slag boxes" which then exit into a water quench where the material cools and splinters into pieces. Once again, a sample of the material is analyzed using the TCLP test. If it meets the LDR treatment standards, it is declared a "product" and sent to onsite unprotected storage piles. If it does not, the material is reintroduced into the vitrification furnace. This proces is repeated until the material meets the applicable LDR treatment standards.

Gases resulting from the combustion of liquid and solid hazardous wastes introduced into the rotary kiln pass through the fired oxidizers #1 and #2. More hazardous liquid wastes and contaminated water are introduced into these oxidizers. Combustion gases from the kiln and oxidizers #1 and #2 are pulled by two induced draft fans through the wet/dry scrubber system (oxidizers #3 and #4), the baghouses, and then exit the stack.

B. The History of Hazardous Waste Combustion Regulation

EPA, in its Statement of Basis for the proposed denial ("Initial Statement"), set out at length the rules that apply in this matter, and how those rules evolved.[3] In summary, the Agency explained how the hazardous waste rules have always distinguished between conventional hazardous waste treatment and disposal activities and legitimate recycling activities, and the interpretive criteria for distinguishing between these categories. In the initial 1980 rules, the Agency created a partial exemption for hazardous wastes that were "beneficially used or reused or legitimately recycled or reclaimed."[4] Incinerators were defined as devices using "controlled flame combustion, the primary purpose of which is to thermally break down hazardous waste,"[5] and were accordingly ineligible for the exemption for legitimate recycling. These 1980 rules applied to MSP when it commenced hazardous waste combustion activities in 1985 since they were the rules in the federally authorized Louisiana hazardous waste program, and thus are the applicable rules in determining whether MSP could operate without a permit.

EPA amended these rules in 1985. The amended rules continued to separately demarcate disposal/incineration

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[3] Initial Statement pp. 4-7.

[4] 40 C.F.R. § 261.2(a)(1) as promulgated at 45 Fed. Reg. 33120 (May 19, 1980).

[5] 40 C.F.R. § 260.10 as promulgated at 45 Fed. Reg. 33074.

activities from recycling activities, regulating the first differently from the second. EPA also added new definitions of "industrial furnace," "boiler" and "incinerator" to the rules, industrial furnaces being enumerated units using thermal treatment to recover materials or energy, boilers being devices of a specified design recovering heat from hazardous waste, and incinerators encompassing all remaining controlled flame combustion devices. Thus, devices using controlled flame combustion, such as MSP's, that are not boilers or industrial furnaces are classified as incinerators. In addition, in that same rule, EPA amended the incineration rules to state that any combustion device —boiler, industrial furnace or incinerator—burning hazardous wastes to destroy them was subject (indeed, remained subject) to the incineration standards. EPA also added substantive standards for hazardous wastes recycled into products used in a manner constituting disposal. These rules were amended in 1988 to require that the recycled wastes also meet any applicable treatment standard implementing the land disposal restriction statutory provisions.

EPA also explained that these rules do not specify or otherwise quantify precisely what conduct is disposal or incineration and which is recycling. EPA has accordingly interpreted these terms by indicating circumstances that are relevant in determining whether particular conduct is one or the other. These interpretive criteria are discussed and applied later in this Final Statement of Basis. EPA also notes that MSP in its comment letter challenges the legality of these interpretive criteria. EPA's response is in a separate memorandum to the Administrative Record to this proceeding, prepared by EPA Associate General Counsel for Solid Waste and Emergency Response.

C. EPA's Interpretation of the Definition of Industrial Furnace

EPA explained in the Initial Statement that it interprets the definition of industrial furnace in 40 C.F.R. § 260.10 to apply only to devices enumerated in the rule that are used as integral components of a manufacturing process. This interpretation of the rule is reasonable for the reasons set out at pp. 8-9 of the Initial Statement. In fact, no commenter challenged the Agency's interpretation.

II. EPA's RATIONALE FOR DENYING MSP's PERMIT APPLICATION

EPA is denying MSP's application on four bases, all of them severable grounds for decision. First, EPA finds that MSP is engaged in incineration of hazardous wastes. The kiln is not being used as a component of a manufacturing process, but operates to incinerate hazardous wastes. The principal reasons for this finding are that MSP burns large volumes of hazardous waste for destruction, burns hazardous waste in excess of amounts needed for its ostensible recycling process or are ineffective for that purpose, burns hazardous wastes indiscriminately without any attempt to meet specifications on either incoming or outgoing material, and produces a product which is either ineffective or less effective than the product for which it purports to substitute. Further evidence that the company is an incinerator is that all of its revenues come from its waste combustion operations, and the toxic constituents in the wastes are being abandoned because they typically do not contribute to the ostensible recycling activities. The company keeps only limited records of the disposition of its ostensible product, again inconsistent with activities of *bona fide* recyclers. In fact, there is a strong similarity in operating practices between MSP's activities and those of commercial hazardous waste incinerators. All of these facts strongly support classification of their activities as incineration, and denial of a permit as an industrial furnace.

Focusing entirely on the output of MSP's process, EPA further finds that MSP is not producing a legitimate product for the general public's use and otherwise failing to satisfy 40 C.F.R. § 266.20 standards, even if (contrary to EPA's views) one were to evaluate the legitimacy of MSP's activities based solely on the factors enumerated in § 266.20. However, the Agency's view is that MSP's activities are properly classified as incineration, and that consideration of § 266.20 is both unnecessary and legally irrelevant.

The third ground for denying the application relates solely to the hazardous waste-fired oxidizers that MSP operates. As a matter of law, these devices cannot be industrial furnaces because they are not among the enumerated categories of devices in the regulatory definition of industrial furnaces.

The final ground for decision is that MSP's compliance history is so blemished, and the company has proved so untrustworthy, that EPA does not believe that any permit can insure protectiveness, no matter how stringent its conditions. Accordingly, EPA is exercising its omnibus permitting authority to deny the application for this reason as well.

A. MSP is not an Industrial Furnace

Industrial furnaces comprise 12 specifically enumerated types of devices that are "integral components of manufacturing processes" using thermal treatment to "accomplish recovery of materials or energy."[6] The devices were listed based on a "series of criteria relating to how the device was an integral component of a manufacturing process."[7] These criteria are listed in the definition as factors that the Agency will consider when adding new

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[6] 40 C.F.R. § 260.10.

[7] 50 Fed. Reg. at 627 (Jan. 4, 1985).

devices to the list. The criteria were "selected because they describe those aspects of industrial furnaces that distinguish them from hazardous waste incinerators." [8] To be designated as an industrial furnace, a device must meet one or more of the standards.[9]

The essential attribute of an industrial furnace, as set out in the definition and criteria, is to be an integral component of a manufacturing process. MSP processes nothing but wastes—both hazardous and nonhazardous. It is therefore particularly relevant to the inquiry of whether MSP is engaged in a manufacturing process to assess its operations using the sham recycling criteria repeatedly enunciated by EPA as relevant factors to consider in distinguishing recycling and incineration/disposal activities.[10] These criteria relate to the function wastes serve when they are processed (i.e., whether or not they are being recycled, that is, used for manufacturing), and whether the process itself is engaged in manufacturing (or other recycling).

1. MSP's Rotary Kiln is Not Designed or Used Primarily to Accomplish Recovery of Material Products

EPA has determined that, although MSP's kiln was originally designed to accomplish material recovery (since it was a lime kiln prior to its acquisition by MSP) the facility uses its kiln principally for the destruction of hazardous wastes, not the recovery of a material product. The basis for this determination is set out in the remainder of this document.

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[8] 48 Fed. Reg. 14483 (April 4, 1983).

[9] *Id.*

[10] *See* 50 Fed. Reg. at 627; 48 Fed. Reg. at 14484 and n. 15 (if a combustion device is being used to destroy hazardous wastes, it is not recycling those wastes and cannot be deemed to be using the wastes as part of a manufacturing process.)

2. MSP Does Not Use Its Rotary Kiln to Burn or Reduce Raw Materials to Make a Material *Product*

Raw materials are non-waste materials that, in industrial furnaces, are used as ingredients or feedstocks.[11] For example, cement kilns use limestone as a raw material ingredient. Lightweight aggregate "is produced much like cement, but the feedstocks are special clays, pumice, scoria, shale, or slate."[12] Although MSP has claimed in its BIF permit application to be a lightweight aggregate kiln, MSP does not burn raw materials as feedstock for its "product." MSP burns *only* waste material to produce its "aggregate."[13] Therefore, MSP does not meet this industrial furnace criterion.

3. MSP Does Not Use Its Rotary Kiln to Burn or Reduce Secondary Materials as Effective Substitutes for Raw Materials in a Process Using Raw Materials as Principal Feedstocks

This criterion does not apply to MSP. As discussed in detail later in this document, MSP's material is not industrial "aggregate." Therefore, MSP's use of secondary materials does not constitute an effective substitute for raw materials.

4. MSP Does Not Use Its Rotary Kiln to Burn or Reduce Secondary Materials as Ingredients in an Industrial Process to Make a Material Product

Since MSP does burn and reduce secondary materials which it claims to use as ingredients, the issues presented

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[11] *Cf.*, RCRA § 1004(35) (definition of "virgin material.")

[12] 56 Fed. Reg. 7139 (Feb. 21, 1991).

[13] *Exhibit A-1* of Administrative Record. For reasons discussed later in this document, MSP's material does not meet the definition of "lightweight aggregate" or "aggregate" as those terms are known in the industry.

by this criterion are whether MSP is involved in an "industrial process" and whether the material produced by MSP is a "product." In the industrial furnace context, these two issues are inextricably intertwined—legitimate industrial processes produce legitimate products. Conversely, if a facility claiming to produce a product through the burning of hazardous waste (a waste-derived product) is not producing a legitimate product, the facility is involved in incineration, not an industrial process. As set forth below, EPA's conclusion is that MSP is not involved in an industrial process and does not produce a legitimate material product.

i. Determining Whether a Facility is Involved in an Industrial Process

This analysis requires the examination of the operating practices of a facility claiming to be an industrial furnace. The recycling factors (or indicia of sham recycling) are criteria that EPA has determined are relevant in such an analysis. By applying these factors to the activities of a professed recycler a finder of fact, here the Agency in its permit-issuing capacity, is able to make the factual determination as to whether the facility is engaged in a legitimate industrial process or whether the facility is merely incinerating and disposing of hazardous waste.

a. Evidence of burning for destruction.

The most obvious indicia of combustion being incineration is if hazardous wastes are burned for destruction. MSP has burned, and continues to burn large volumes of hazardous wastes that have no recycling value. The record contains clear evidence (uncontradicted in the related civil trial) that the company burned substantial volumes of hazardous waste with no or *de minimis* heat or ash value (the two components of hazardous waste, MSP claims to recycle). Examples are waste methylene chloride, waste carbon tetrachloride, various no energy

hazardous wastewaters, hazardous containerized gases, hydrochloric acid and other acids, poisonous liquids, trichlorethylene, trichlorotrifloroethane, nitric oxide, chloroform and phosgene.[14] The company also solicits other hazardous wastes with no recycling value, including formaldehyde wastes, mercury wastes, and other hazardous gases.[15] The company also routinely disregards its own criteria for waste recyclability (each waste should have at least 5,000 Btu/lb. and 10% ash content) set out in its Recycled Materials Analysis Plan (REMAP).[16] Un-

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[14] *Exhibit E-1* of the Administrative Record. Trial transcript vol. 1 p. 52 and exhibit PL-4973 (hazardous waste floor strippings consisting entirely of methylene chloride); vol. 3 pp. 24-25 (Methylene chloride and hazardous waste creosote in soil) (testimony of Guy Tidmore); vol. 4 pp. 30-33 (miscellaneous no recycling value hazardous wastes including process waste water) (testimony of Roy Varnado); vol. 10 p. 56 (methylene chloride and carbon tetrachloride); vol. 11 pp. 26-27 (sulfur and hazardous wastewaters) pp. 31-32 (hazardous acids), Exhibit 5601 (manifest from Tri State Steel and Drum of "poisonous liquid" hazardous waste) (all taken from manifests of hazardous waste shipped to MSP); vol. 12 p. 40 (no energy, no material value hazardous wastes in lab packs) (testimony of Dr. Douglas Kendall); vol. 15 pp. 52 and 54 (contaminated surface runoff from MSP's facility) (testimony of Michael Crocker); vol. 15 pp. 29-30 (lab packs) (testimony of Russell Preston); vol. 7 pp. 8-11 and Exhibit PL-4790 (trichlorethylene, trichlorotrifloroethane, chloroform, nitric oxide wastes); vol. 8 pp. 60-61 (trichloroethylene and chloroform) (testimony of Donald Corwin); vol. 21 pp. 47-48, 52 (phosgene in lab pack) (testimony of Barbara Fontenot); vol. 27 pp. 90-91 (hazardous gases) (testimony of James Renfroe). Exhibits admitted into evidence at the civil enforcement trial showing acceptance of similar waste containing no recycling value include PL-140; P-5601, PL-141, PL-149, PL-174, PL-258.A.1, P-2548, PL-4974.

[15] Trial transcript vol. 24 pp. 56-58 (testimony of Stanley Wrobleski).

[16] Trial transcript vol. 10 pp. 63-64 (testimony of Dr. Douglas Kendall). The testimony indicated that in February 1991, 57 waste shipments deviated from MSP's criteria; in February 1992, 370 tons of hazardous waste deviated from these criteria; vol. 24 p. 34 (testimony of Stanley Wrobleski, MSP's plant chemist, that MSP

contradicted testimony at trial showed that company officials conceded to a state inspector that they burned hazardous waste for destruction.[17]

Prior to the promulgation of the BIF regulations, during the majority of the years of MSP's operation, EPA maintained that if wastes are burned for destruction in a combustion device, that device is an incinerator.[18] EPA adopted this interpretation because burning hazardous wastes for destruction is a regulated activity (standards for incineration of hazardous waste took effect on November 19, 1980) and because burning hazardous wastes for destruction is a quintessential hazardous waste treatment activity which by law cannot be conducted except by facilities with a RCRA permit or interim status. These reasons applied even if a unit that incinerated hazardous wastes was also used to recycle different hazardous wastes: the unit was still used to destroy hazardous wastes and was subject to the standards for incinerators when it did

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does not adhere to REMAP criteria); vol. 4 pp. 28, 30-31, 33 (testimony of Roy Varnado).

[17] Trial transcript vol. 4 p. 33 (testimony of Roy Varnado).

[18] 48 Fed. Reg. 11158 n. 2 and 11159 (March 16, 1983) (interpreting 1980 rules defining incinerator as a device burning hazardous waste for the primary purpose of destruction) ("We consider wastes that are [n]ot being burned legitimately to be burned for the primary purpose of destruction, within the meaning of 40 C.F.R. § 260.10(a) (definition of 'incinerator'). The reference to 'primary purpose' in that provision thus applies with regard to each individual feed input to a thermal combustion unit. If the particular input has little or no fuel value, it is being burned for the purpose of destruction. Consequently, the device in which these 'fuels' are burned is an incinerator. . ."); 40 C.F.R. § 264.340 (a)(2) and § 265.340(a)(2) as promulgated at 50 Fed. Reg. at 666 (amending the operating standards for hazardous waste incinerators to apply to "owners or operators who burn hazardous wastes in boilers or industrial furnaces in order to destroy the wastes") and 53 Fed. Reg. at 522 (Jan. 8, 1988) (confirming that this incinerator applicability provision applies to each hazardous waste that is burned).

so. Any other interpretation would have allowed hazardous waste incineration to go unregulated because the unit did not incinerate all of the time (i.e. engaging in exempt activity could shield a facility from the consequences of engaging in non-exempt activity), a result not in accord with statutory language or policy.

Applied to MSP, this means that it is an incinerator because it has always burned hazardous wastes for destruction and is therefore ineligible to operate because it has no incinerator permit and is ineligible for interim status because it illegally began operating after 1980. It also is ineligible for a permit as a BIF because it is not, and never has been, a legitimate receiver. MSP has argued, however, that this is too draconian a result. They maintain that a recycler that occasionally burned hazardous waste for destruction should not automatically be classified as an incinerator. EPA acknowledges that it has discretion as to how to enforce the rules. Occasional, inadvertent burning of hazardous waste for destruction could be penalized by fines and equitable relief rather than strict application of the rules. But the situation presented here, in EPA's view, shows consistent, routine, and still on-going burning of hazardous wastes with no recycling value.[19] MSP has operated this way since its inception, and continues to do so. It is well within the Agency's discretion to deny a permit as a BIF to a company engaged in such incineration activities.

It should be noted that MSP contested that at least some of the wastes cited above lack energy or material

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[19] MSP argued that at least one of the wastes burned for destruction, phosgene (the chief component of World War I mustard gas, also used in polyurethane manufacture) was burned in a small amount (approximately one per cent of one pint). Trial transcript vol. 24 p. 69 (testimony of Stanley Wrobleski). However, there was also evidence that burning lab packs (the phosgene wastes came from lab packs) is a substantial part of MSP's business. The company customarily burns 300-400 a week and can burn as many as 800 a week. *Id.* at vol. 15 p. 37 (testimony of Annika Keslick). These are burned without any verification of contents by MSP. *Id.*

value. They maintain, for example, that the low energy/low ash wastes that are burned in drummed form have material value because of the scrap metal value of the drum.[20] They make the same assertion with respect to the no energy/no ash wastes in lab packs; the packs and packing materials (i.e. vermiculite (also used as kitty litter)) furnish ash value.[21] This argument is incorrect as a matter of law. A container holding a hazardous waste is not itself part of that waste,[22] and the containerized hazardous wastes are therefore not being recycled even if the container has material value.

MSP also argues that contaminated soils and contaminated wastewaters contribute to the process by adding ash value or some useful lubricating or quenching property.[23] However, EPA regards contaminated media (i.e. soils and naturally occurring waters like rainwater or groundwater) to consist of two distinct components, the contaminating hazardous waste and the environmental media.[24] Accordingly, the fact that soil or water may contribute something of value is legally irrelevant, as it is with containers holding hazardous waste. The hazardous waste itself must be recycled. There is ample evidence that the contaminating hazardous wastes in the

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[20] Trial transcript vol. 15 p. 15 (testimony of Russell Preston); vol. 26 p. 18 (testimony of James Renfroe); vol. 23 p. 11 (testimony of Charles Bennett); vol. 24 p. 58 (testimony of Stanley Wrobleski).

[21] Trial transcript vol. 26 p. 17 (testimony of James Renfroe).

[22] 40 C.F.R. § 261.7.

[23] Trial transcript vol. 15 pp. 54, 62-63 (testimony of Michael Crocker).

[24] *See, Chemical Waste Management v. EPA*, 869 F.2d 1526, 1538-39 (D.C. Cir. 1989) (upholding this interpretation); 57 Fed. Reg. at 983 (Jan. 9, 1992); 57 Fed. Reg. at 37225 (Aug. 18, 1992).

soil and wastewaters have little or no fuel value and no ash value.[25]

b. When a secondary material is ineffective or only marginally effective for the claimed use, the activity may not be recycling but surrogate disposal.[26]

The issue here is whether the hazardous wastes used by MSP produce an effective, usable "aggregate" or whether the hazardous wastes produce ineffective or marginally effective "aggregate."

Industries that use aggregate demand that the material conform to very stringent specifications.[27] Experts engaged by EPA and other entities, such as the Louisiana Department of Transportation and Development ("La. DOTD"), conducted tests on MSP's "aggregate" and compared the MSP material to aggregates commonly accepted by the various industries that use such materials. These tests included standard engineering tests dictated by the building and highway construction industries and the asphalt and cement industries.

These experts concluded that MSP's material is not useful by industries that use aggregate and is not a mar-

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[25] Trial transcript vol. 11 p. 20 (testimony of Dr. Douglas Kendall) (MSP burning pentachlorophenol wood preserving wastes contained in soil; pentachlorophenol is a low energy hazardous constituent (*see*, 48 Fed. Reg. at 11160 (March 16, 1983) and Trial transcript vol. 7 p. 12 (testimony of Donald Corwin)); vol. 3 p. 25 (testimony of Guy Tidmore) (creosote contaminated soil, hazardous waste portion not recycled); vol. 11, p. 52 (testimony of Dr. Douglas Kendall) (burning contaminated runoff); vol. 4 p. 33 (testimony of Roy Varnado) (process wastewater); vol. 15 pp. 56, 58 (testimony of Michael Crocker) (contaminants in wastewater do not contribute to the process); vol. 25 p. 66 (testimony of Henry Robards) (contaminated dirt burned by MSP has no Btu value).

[26] 50 Fed. Reg. at 638.

[27] *Exhibit A-14* of Administrative Record—(Little and Hudson Report); *Exhibit A-15* (La. DOTD report).

ketable aggregate product.[28] One testing laboratory indicated that the smaller particle of the material could have some potential use if the material was sieved or further processed to remove the larger particles. The removal of the larger particles resulted in the disposal of forty percent of the material. However, the testing entity voiced concerns regarding the potential usability of even the fine particles due to the variability of the MSP material.[29] These concerns were echoed by other experts who concluded: "[a]s a result of the nature of the inputs to the MSP incinerator, the control process and/or lack of control in the process, and the relatively random way in which stock piles are stored, sorted, moved, and restored, there is considerable variability in the properties of the material. . . . [T]his variability is very significant in evaluating the potential uses of the material. Since all civil engineering projects have relatively tight specifications which require close tolerances on the various properties of the material and since the physical behavior of any material depends upon it [sic] physical characteristics to a large extent, this variability is a severe detriment [to the usefulness of the MSP material.]" [30]

MSP also hired consultants to determine whether the material was usable.[31] MSP's consultants stated that the

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[28] *Exhibit A-15; See also,* Trial transcript vol. 20 pp. 53-66 (testimony of Ronald Hudson).

[29] *Exhibit A-16* of Administrative Record—(Southwestern Labs Report).

[30] *Exhibit A-15; see also,* Trial transcript vol. 20 p. 68 (testimony of Ronald Hudson).

[31] *Exhibit A-17* of Administrative Record—(DeVille Report); *Exhibit A-18* (Brosnan Report); *Exhibit A-20* (Root Report); *Exhibit A-21* (Amirkhanian Report). EPA also finds it significant that MSP did not make any effort to determine whether its "aggregate" would be a usable, marketable material prior to beginning operations. MSP's interest in determining whether its material was usable seems to have been sparked by EPA filing a lawsuit

"primary aggregate" and "slagged aggregate" have different uses which range from general fill material, brick material, as admixture in both asphaltic concrete and portland cement concrete and soil cement. However, recent deposition testimony and testimony adduced from these consultants at the civil enforcement proceeding, indicate that in some cases, they have conflicting opinions regarding the manner in which the materials might be used.[32] While some MSP consultants say the material is usable in asphaltic concrete and for portland cement concrete,[33] another says there is no practical market for the material for these uses and he would not recommend it for use in asphalt because it does not meet the proper specifications.[34]

In any event, it is EPA's opinion that the conclusions of MSP's consultants regarding the material's usability do not stand up under scrutiny. For example, the two experts claiming that the material can be used as an admixture in hot asphaltic concrete admit that the material has never been field tested for this use.[35] Further-

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against the company in federal court. In the Agency's opinion, no legitimate aggregate business would invest the sums of money necessary to begin aggregate production without first discerning whether the material it produced would be a usable, saleable product. *See also,* Trial transcript vol. 30 p. 64 (testimony of Richard Root); vol. 34 pp. 37-38 (testimony of James Brock).

[32] *Exhibit A-19* (Transcript of January 28-29, 1994 deposition of V.E. Sendukas); *See also,* trial transcript vol. 29 pp. 17 to end and vol. 30 pp. 1 to 55 (testimony of V.E. Sendukas); vol. 30 pp. 55 to end (testimony of Richard Root); vol. 34 pp. 20-56 (testimony of James Brock).

[33] *Exhibit A-20; see also,* trial transcript vol. 30 pp. 104-106 (testimony of Richard Root).

[34] *Exhibit A-19; see also,* trial transcript vol. 30 p. 7 (testimony of V.E. Sendukas).

[35] *Exhibit A-22* (Transcript of deposition of Amirkhanian) and *Exhibit A-23* (Transcript of deposition of Root). *See also,* trial transcript vol. 30 p. 97 (testimony of Richard Root).

more, both experts admitted that the asphaltic concrete samples in which MSP's material was used, failed to meet all applicable La.DOTD specifications for asphaltic concrete.[36] Finally, the results of tests performed on the MSP asphaltic concrete samples, unlike the results from samples utilizing other materials, failed to prove that the asphaltic concrete mixture was improved by the addition of MSP's material. These results indicate that, rather than being a beneficial use, the use of MSP's material in asphaltic cement may merely be a means of disposing of the material.[37]

The likelihood that MSP is merely disposing of its material in its endeavors to use the material in hot asphaltic concrete is substantiated further by the fact that a former MSP consultant concluded that there were many practical problems with using MSP's material as an admixture in hot asphaltic concrete.[38] Furthermore, he concluded that use of MSP's "primary" material would not be feasible in hot mix asphaltic concrete due to the absorption rate and gradation variations of the material. EPA's experts found that there were additional practical problems which indicate that contractors would not purchase the material for use in asphaltic concrete.[39]

In sum, if this material is going to be sold and actually used in the field it would appear that the most likely use would be as a general fill.[40] Indeed, to date, the vast

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[36] Trial transcript vol. 29 p. 53 (testimony of V.E. Sendukas).

[37] *See generally*, the discussion of this issue in section III.A.4.i.k. of this document.

[38] *Exhibit A-24* (Barry L. Moore Report).

[39] *Exhibit A-14*.

[40] EPA does not accept the blithe assurances of MSP's counsel, made to the jury without any supporting evidence, that henceforth MSP will incorporate its combustion residue in concrete or asphalt. Trial transcript vol. 55 p. 23.

majority of MSP's "aggregate" has been put to this "use."[41] The MSP consultant with the longest history of working with MSP's material, would not recommend the material for use in asphalt but has recommended it for general fill and soil cement. The consultant admitted that these are the two uses with the fewest specifications but asserted that this was merely a coincidence.[42]

The Agency does not believe that all materials that occupy a void or can form an embankment because they meet the minor requirements for general fill material are "aggregate" as envisioned in the definition of industrial furnace.[43] In fact, the Agency has stated repeatedly, that when an alleged waste-derived product replaces a common, low value virgin material, the "product" is most likely a means of disposing of the waste and the process generating the product is surrogate treatment or disposal.[44] This is particularly true for materials being used as fill, an activity tantamount to illicit landfilling.[45]

Furthermore, this type of uncontrolled landfilling presents the potential for adverse effects on human health and the environment. Indeed, in the present case, there appears to be evidence of such adverse health effects. At

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[41] Prior to May of 1989, MSP sold small amounts of its material for fill material and roadbed fill to private entities. Presently, MSP "sells" the material to its subsidiary Recycling Park, Inc. for use as general fill. See *Exhibit A-46* of Administrative Record (Description of locations where MSP material used.)

[42] Trial transcript vol. 30 pp. 12-13 (testimony of V.E. Sendukas).

[43] *See* 50 Fed. Reg. at 634 (stabilized wastes are not products); 48 Fed. Reg. at 14485 (waste stabilization processes where the stabilized materials is then used as fill are "waste treatment operations [and] are not production processes and can therefore be regulated as waste management"); 45 Fed. Reg. 33095.

[44] 45 Fed. Reg. at 33093 (use of hazardous waste for landfilling); 56 Fed. Reg. at 7159, and 7185 (use as substitute for water or aggregate).

[45] 45 Fed. Reg. at 33093; 48 Fed. Reg. at 14485 (April 4, 1983).

the civil enforcement proceeding, a former user of MSP's material testified that MSP's "primary aggregate" had been used as fill material beneath his house.[46] He acquired the ash from his uncle who had purchased the material from MSP to use at an industrial site.[47]

Located adjacent to a bayou, the witness's house was built on three foot high pilings to protect the home against frequent flooding. The witness stated that he had remodeled the home and had frequently entered the crawl space to perform various tasks such as rewiring.[48] He also testified that his two daughters, ages seven and three, often played under the house.[49] After this exposure to the MSP material, both the witness and his daughters exhibited elevated blood lead levels. The family's blood lead levels returned to normal after they took precautions against coming into contact with the MSP material.[50]

After the Agency for Toxic Substances and Disease Registry determined that the material under the witness's home presented a possible public health concern,[51] and EPA Region 6 threatened to issue an Administrative Order seeking remediation of the material under the home, MSP purchased the home and eventually removed the material. MSP now asserts that its material will only be used in industrial settings,[52] thereby admitting that it is not suitable for use as general fill at residential locations. The example just discussed, however, illustrates

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[46] Trial transcript vol. 20 p. 8 (testimony of Dexter Leonard).

[47] *Id.* at p. 7.

[48] *Id.* at p. 11.

[49] *Id.* at p. 9.

[50] *Id.* at pp. 17-22.

[51] *Exhibit E-10* (Memorandum from Allan S. Susten, Ph.D. to Carl Hickam, Re: Health Consultation Follow-up: Dexter Leonard Residence Layfayette, [sic] Louisiana.)

[52] *Exhibit D-7* (MSP's Regulatory Status Book-Introduction).

that MSP cannot control the final destination of its material. This is one of the primary reasons the regulations require disposal of incinerator residue, such as MSP's, in hazardous waste landfills.

Evidence that contact with MSP's material may cause health concerns, is further proof that the ash is not an effective aggregate and that MSP is not in the business of aggregate production but in the business of waste disposal.[53] This conclusion is substantiated by the fact that MSP never field tested, marketed or used its material for any high end aggregate use. Furthermore, EPA experts concluded that no one in the country with the exception of MSP claims to manufacture general fill material.[54] Manufacturing of general fill is unusual primarily because it is financially infeasible to transport such inexpensive material to sites located more than a short distance from the source of the material. Thus, no legitimate manufacturer of such a low end product could survive financially.

c. Sham recycling may occur when secondary materials are used in excess of the amount necessary for operating a process.[55]

EPA has stated that it is relevant in assessing whether conduct is disposal or recycling to ascertain if hazardous wastes are used in excess of the amount needed to operate the recycling process.[56] To be recycled at all, of course,

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[53] *See* 56 Fed. Reg. at 7185 (end products rendered unsafe because they are derived from hazardous waste are ordinarily not legitimate products.)

[54] *Exhibit A-14*; Trial transcript vol. 41 p. 120 (testimony of Doss White).

[55] 50 Fed. Reg. at 638.

[56] 50 Fed. Reg. at 638; 56 Fed. Reg. at 7185 (February 21, 1991).

hazardous wastes must contribute a specific beneficial quality to the product for which they are being used. Even assuming, however, that such a benefit can be demonstrated, a recycler may still be engaged in sham activity if the amount of waste used in the process exceeds the amount necessary to confer the beneficial quality sought from the wastes. Notwithstanding that virtually no process is 100 per cent efficient, a process which uses hazardous wastes in considerable excess can be viewed as a disposal process.

MSP claims to satisfy this criteria because every hazardous waste they burn contributes some valued property, either energy to fuel the kiln, bulk for the kiln output, or some lubricating or cooling property.[57] It is evident, however, that substantial amounts of waste are not used. First, as discussed in section a above, some wastes are burned for destruction and contribute nothing to the process. Others are used to excess. Assuming that bulk (i.e. volume) is the desired property, MSP burns many wastes that contribute virtually none.[58] Metal bearing wastes actually impede the amount of ash produced because the presence of metals necessitates vitrification which reduces the volume generated. This reduction in volume is discussed further in section g, below. Assuming that energy is the desired property in the hazardous wastes, MSP also burns in excess. Their process generates significant excess energy.[59] MSP actually charges generators progressively more as the Btu value of the waste increases.[60] Contaminated water is also burned in excess.[61]

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[57] Trial transcript vol. 22 p. 75 (testimony of Charles Bennett).

[58] Trial transcript vol. 22 p. 49 (testimony of Charles Bennett) (K001 wastes, which are largely organic but with low energy value; such a waste would generate little ash).

[59] Trial Transcript vol. 9 p. 18 (testimony of Donald Corwin).

[60] Trial Transcript vol. 23 p. 11 (testimony of Charles Bennett).

[61] Trial transcript vol. 23 p. 9 (testimony of Charles Bennett) (water needed for lubrication at MSP could be provided by "a

EPA also indicated in its initial statement of basis that further evidence that hazardous wastes are being used to excess is that MSP generates "aggregate" which has no use and so simply accumulates.[62] Again, this indicates that the burning of hazardous waste is excessive.

EPA therefore finds that MSP is burning hazardous wastes in excess, and that this is evidence that the company is disposing of hazardous wastes rather than recycling them.

d. A process may be sham recycling if the secondary material used is not as effective as the material it replaces.[63]

MSP claims to burn hazardous waste instead of raw materials to produce its "aggregate." As discussed above, EPA does not consider MSP's material to be usable. The secondary materials used by MSP are not as effective for aggregate production as the raw materials utilized by the aggregate industry. They contribute high concentrations of toxic metals that make the material potentially dangerous, reduce the volume generated, and make the material more difficult to slag.

e. Wastes may be burned for destruction if the operator receives a greater percentage of income from being paid to burn waste than it makes from producing a product.[64]

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pretty good garden hose"). Other testimony indicated other uses of water such as to cool the units and prevent lava-like conditions in the kiln. *Id.* at 10. MSP, however, has never accounted for the need to burn large volumes of water. EPA believes a major reason is to get rid of the water, possibly as a means of trying to satisfy Clean Water Act requirements.

[62] Initial Statement pp. 15-16.

[63] 50 Fed. Reg. at 638; and 53 Fed. Reg. at 522.

[64] 50 Fed. Reg. 617, 638; 52 Fed. Reg. at 17013 (May 6, 1987); and 53 Fed. Reg. at 522.

EPA indicated in its initial decision that a company that makes little or no money from marketing the product of its recycling activities, and makes large amounts of money by being paid to take wastes to process, may be a functioning as a waste treater and disposer.[65] EPA stresses that this criterion applies only to a possible inference that can be drawn. The Agency is not stating, nor has it ever said, that legitimate recyclers must make most of their income from recycling activities, or that recycling activities must show a profit. EPA agrees with MSP that such an outcome-determinative application of this criteria ignores the economics of recycling, which is that recycling activities are often subsidized by income from waste management activities.

However, EPA believes particular circumstances remain relevant in assessing the primary purpose of an activity (the applicable regulatory standard for determining if a device was an incinerator when MSP commenced hazardous waste management activities), as well as assessing (under the 1985 rules) if an activity is disposal/incineration or recycling. Other than the few tons of "aggregate" MSP sold prior to ceasing sales in 1989, the material it presently sells to its subsidiary Recycling Park, Inc., and some income produced through the sale of scrap metal, MSP makes the majority of its income from generators of hazardous waste that pay a significant fee for the disposal of their hazardous materials. In this case, MSP generates hundreds of millions of dollars in revenue from generators who pay MSP to combust their hazardous wastes. It generates virtually no revenue from the 'recycling' phases of its operations, and it costs MSP more to produce its aggregate (roughly $65 per ton, not including transport costs) than it obtains from the material's sale.[66] It has no sales force for marketing its product.[67]

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[65] Initial Statement pp. 17-18.

[66] Trial transcript vol. 1 p. 90 (testimony of Guy Tidmore).

[67] *Exhibit A-27* of Administrative Record (Transcript of August 5, 1993 deposition of Raymond "Mac" Wade); Trial Transcript vol. 16 pp. 77-78 (testimony of "Mac" Wade).

Its price structure for its product has never changed; the product has been and is sold for the same $1-$2 per ton (when any money was charged). The company's president testified that he intended from the beginning of the operation that all of the company's income would come from the fees generators paid, and that his intention has come to pass.[68]

EPA believes it is a permissible inference that this enormous economic disparity between income from the company's receipt of hazardous waste and its alleged recycling activity is evidence that the wastes are being incinerated and or disposed. By itself, this inference would not be sufficient evidence for the Agency to make a decision to deny the permit application. The Agency's decision would also be the same if it did not consider this criterion. EPA repeats, however, that it believes the information relevant to its ultimate decision.

f. Wastes may be burned for destruction if they are solicited and accepted indiscriminately and are not selected to meet specifications related to a recycling purpose. A process so operating is not an integral part of a manufacturing process.[69]

Although MSP claims to recover ash and Btu value from hazardous wastes, in reality, MSP has no formula for its "aggregate." MSP has notified EPA that it burns numerous different hazardous wastes, and it burns them in no particular ratio.[70] Each time a barrel of waste is

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[68] Trial transcript vol. 42 pp. 59-60 (testimony of John M. Kent, Sr.).

[69] 50 Fed. Reg. at 638; and 53 Fed. Reg. at 522.

[70] *Exhibit A-9* (Part A application list of accepted wastes) *Exhibit A-8* (Transcript of 30(b)(6) deposition of Renfroe, Robards and Preston).

emptied into the mixing barges, or a lab pack is placed into the kiln, the "feedstock" mixture changes.

MSP's sales force solicits waste from a variety of industries and processes and the wastes are accepted on a first-come, first-served basis rather than on the basis of particular specifications.[71] Wastes are not selected to meet any requirement other than the requirement that the generator pay MSP to burn its waste.

Based on this information, EPA stated in its initial decision that notwithstanding MSP's claims to recover energy and material value from hazardous wastes, it in fact accepts wastes virtually indiscriminately; that is, without any attempt to differentiate based on how 'product' quality may be affected.[72] They burn virtually every type of identified and listed hazardous waste, and burn them in no particular ratio. There are no specifications on the end product other than that it meet land ban treatment standards.

Evidence submitted in the civil enforcement proceeding confirms that MSP solicits wastes indiscriminately, has no particular formula or recipe for producing its product, has no specifications for that product, and has no idea how many of the hazardous wastes it burns contribute anything of value to its process. With respect to specifications on incoming wastes, the company maintains that it has a Recycled Materials Analysis Plan (REMAP) calling for it to accept as a rule of thumb only hazardous wastes with 5000 Btu/lb. and 10% ash. Evidence showed, however, and the company admitted, that it routinely disregarded these criteria.[73] Moreover, the 10%

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[71] *Exhibits A-5, A-27,* and *A-8.*

[72] Initial Statement pp. 18-19.

[73] Trial transcript, vol. 24 pp. 34, 57, 58 (testimony of Stanley Wrobleski, MSP's plant chemist); *id.* vol. 10 pp. 63-64; vol. 4 p. 33 (testimony of Roy Varnado).

ash criteria is arbitrary in any case.[74] MSP admitted that this figure at most relates to the amount of material recovered, but is unrelated to its quality.[75] The policy was developed without regard to any scientific study or test.[76] The company also has no specifications, and does no analysis, for waste constituents such as silica, alumina, or calcium that do contribute to the quality of *bona fide* aggregate.[77] When wastes are rejected or not solicited, it is for reasons unrelated to the effect they might have on the company's "product." [78]

Company witnesses in fact admitted that they had no idea how certain of the wastes they solicit, such as the low energy/no ash hazardous wastes formaldehyde (U122), mercury (U151), carbon tetrachloride (U124), and chloroflorocarbons (F002) contribute to their process.[79] Lab packs are processed without any attempt to

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[74] The 5000 Btu/lb. criteria is evidently drawn from EPA's statement of enforcement policy from March 16, 1983), and is a reasonable measure of when hazardous wastes have enough energy value to be viewed as fuels, since 5000 Btu/lb. is the fuel value of lowest grade fossil fuels such as wood or lowest grade coal. 48 Fed. Reg. at 11158. The only problem is that MSP routinely disregards this criteria, burning wastes with no energy value. *See supra* note 14.

[75] Trial transcript vol. 27 p. 72 (testimony of James Renfroe); *id.* vol. 10 p. 49 (Douglas Kendall).

[76] Trial transcript vol. 41 pp. 58, 60 (testimony of George Harlow).

[77] Trial transcript vol. 27 p. 77 (testimony of James Renfroe); vol. 16 p. 27 (testimony of Russell Preston).

[78] Trial transcript vol. 26 p. 18 (testimony of James Renfroe) (bulk water shipments not accepted because of shortage of storage capacity at the facility, not because these wastes lack energy and material value or might adversely affect product quality).

[79] Trial transcript vol. 24 pp. 56-58 (testimony of Stanley Wrobleski, MSP's chief chemist and the person MSP witnesses indicated was the definitive expert on how hazardous wastes MSP solicits contribute to its process (*see*, vol. 22 p. 12 (testimony of Charles Bennett)).

verify contents' recyclability.[80] It is, of course, the company's ultimate burden to establish that each hazardous waste that they burn is being recycled.[81]

The only specification that the company has for the output of its process is that it meet LDR treatment standards for metals, as measured by the TCLP.[82] There are no standards for its efficacy as a product.[83]

EPA views all of this information as confirming its initial conclusion that "[s]uch operating practices clearly evidence that the accepted hazardous wastes are burned for disposal and not as part of a manufacturing process." [84]

g. Wastes are burned for destruction if the toxic constituents in the waste do not contribute to the product.[85]

EPA has consistently maintained that it is relevant in determining whether hazardous wastes are being burned for destruction or are being recycled to ascertain if hazardous constituents in the waste are contributing properties of value to the recycling activity. The relevance is that end-products can be used to mask the hazardous constituents, thus providing a means of disposing of them. When combustion activity is involved, burning hazardous constituents without recycling value can indicate that the

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[80] Trial transcript vol. 24 p. 55 (testimony of Stanley Wrobleski).

[81] 40 C.F.R. § 261.2(f).

[82] Trial transcript vol. 24 p. 55 (testimony of Stanley Wrobleski); *id.* vol. 11 p. 25 and vol. 12 p. 36 (testimony of Douglas Kendall).

[83] Trial transcript vol. 24 p. 55 (testimony of Stanley Wrobleski) (product not checked for particle size, mineral content, strength compaction); *id.* vol. 14 p. 31 (testimony of Jerry Truitt) (product not tested for abrasion resistance, abrasion loss, texture, density, color, shape, size, or strength).

[84] Initial Statement p. 19.

[85] 53 Fed. Reg. at 522.

operation is simply engaged in treating those constituents. EPA also notes that although it is true that virtually no recycling process (or virgin material manufacturing process) is 100 per cent efficient, so that not every bit of every constituent in a waste or raw material can be put to use, this does not mean that the fate of hazardous constituents in hazardous wastes is irrelevant in determining whether or not a process is engaged in disposal or conventional treatment or is recycling.

In its initial action, EPA stated that toxic metals in particular are not being used legitimately by MSP's process.[86] The metals have to be treated by slagging. They contribute no useful properties to aggregate.[87] EPA also noted that the company frequently burns low energy wastes, and so cannot be said to be putting organic hazardous constituents to legitimate use either.[88]

Evidence on these points was also presented at the civil enforcement trial. First, toxic metals can be present in high concentrations in MSP's slagged aggregate. Lead, for example, is present at total concentrations of up to 10 per cent with a typical range of 0 to 5 per cent.[89] The company admitted that toxic metals contribute no properties other than bulk to the aggregate.[90] These metals impart high variability to the slag and impede slag formation by raising melting points, reducing or precluding use of the slagged material as aggregate.[91] Presence of toxic metals also decreases the amount of slagged

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[86] Initial Statement pp. 19-20.

[87] *Id.*

[88] *Id.* at n. 71.

[89] Trial transcript vol. 27 p. 86 (testimony of James Renfroe).

[90] *Id.* at 88.

[91] *Id.* vol. 23 pp. 51-2, 53, 61, 71-72 (testimony of Terence P. McNulty).

aggregate being generated. The greater the concentration of metals, the more slagging is necessary. Slagging and subsequent cooling (vitrification) reduces the volume of the primary aggregate and less material is generated.[92] Because the toxic metals are responsible for the slagging operation and its extent, even accepting MSP's argument that constituents that add bulk are contributing legitimately to the end-product, toxic metals are an impediment, not an asset to MSP's ostensible recycling objectives. It is also clear that these wastes are not effectively substituting for raw materials, since they impede product output.[93]

However, the Agency does not accept that toxic constituents contribute merely because they add bulk. The Agency's view is that the key materials in the initial waste are simply being allowed to accumulate and are abandoned through disposal.[94] This is particularly true where an end use is use as fill material, putting hazardous waste on the ground without any other control. This is the quintessential harm RCRA is intended to prevent and so has been consistently regarded by the Agency as an inherently suspect candidate for legitimate recycling since the inception of the RCRA program.[95] The Agency also believes that under the 1980 rules, which were the rules in effect at the time MSP commenced hazardous waste management activities and so are the applicable rules in determining their eligibility for interim status, that the presence of high concentrations of toxic metals in MSP's fill material are relevant in assessing the primary purpose

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[92] *Id.* vol. 24 pp. 7-8.

[93] 50 Fed. Reg. at 638.

[94] 40 C.F.R. § 261.2(a)(2)(i); see also 40 C.F.R. §§ 261.2(c)(1) and (2) (as promulgated at 45 Fed. Reg. 33119 (May 19, 1980)) the rule in effect at the time MSP commenced hazardous waste management operations).

[95] 45 Fed. Reg. at 33093.

of the activity and its legitimacy.[96] Since the metals are not contributing properties of value, make the material more dangerous (see paragraph below), and are placed in the environment without control, a key purpose of the activity was to get rid of those toxics.

Perhaps the key unwanted property that toxic metals impart to the slagged aggregate is to make it more dangerous. As noted above, total lead concentrations in slagged "aggregate" are typically in per cent levels. MSP states that because the slags are required to be treated to reduce leachable lead levels to meet the land disposal restriction treatment standards for metals that the material is safe. However, these standards are not risk-based but technology-based and do not address other relevant exposure pathways such as inhalation, dermal contact and ingestion, and surface runoff.[97] These types of exposure pathways exist for MSP's material, and have caused actual harm.[98] The Agency's view is that toxic metals are being abandoned where they contribute no property but bulk and even there reduce the volume of material generated, add toxicity, and render material too variable for all product uses but filling holes, and that this is relevant under the 1980 rules and the present rules in determining whether the activity is disposal/treatment or recycling.

The same points are true as to the low energy organics and low energy wastes that MSP burns. The organics do

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[96] See 40 C.F.R. § 260.10 (definition of incinerator) (promulgated at 45 Fed. Reg. 33074) and 40 C.F.R. § 261.6(a)(1) (promulgated at 45 Fed. Reg. 33012).

[97] *See*, e.g., 56 Fed. Reg. at 41172 (August 19, 1991); Trial Transcript vol. 18 pp. 27-29 (testimony of John Rosen).

[98] As noted earlier, MSP's fill was used beneath a residence (the Dexter Leonard site). EPA believes it established that due to exposure to this material, Mr. Leonard and his daughters suffered potentially dangerous increases in their blood lead levels. Trial transcript vol. 20 pp. 10-21 (testimony of Dexter Leonard). These levels returned to normal when exposure to the MSP fill material was reduced and eliminated.

not contribute energy value and add no bulk. It can be permissibly inferred that the primary purpose of burning such constituents and such wastes, within the meaning of the 1980 definition of incinerator, is to destroy them since they are not serving any other purpose. The activity also can be viewed as incineration under the 1985 rules,[99] for the same reasons. EPA notes, however, that it does not view this criterion to be a necessary element of its decision to deny MSP's permit application. The Agency would reach the same conclusion if it did not consider this criterion.

h. Careless handling of hazardous wastes by an alleged recycler may indicate that the materials are being disposed of rather than recycled.

EPA has stated that:

> [a] final indication of sham use is if the secondary materials are not handled in a manner consistent with their use of raw materials or commercial product substitutes. Thus, if the secondary materials are stored or handled in a manner that does not guard against significant economic loss (i.e., the secondary materials are stored in leaking surface impoundments, or are lost through fires or explosions), there is a strong suggestion that the activity is not legitimate recycling.[100]

MSP's handling of hazardous waste feedstocks is not indicative of the way most companies handle valuable, raw material feedstocks. MSP's operations have been characterized by substandard handling practices, fires and explosions, although these practices have improved somewhat over time. When they commenced operation, and for years thereafter, materials were stored insecurely (and

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[99] *See* 40 C.F.R. § 261.2(b)(2) and § 264.340(a)(2) as promulgated at 50 Fed. Reg. 666.

[100] 50 Fed. Reg. at 638; *see also, id.* at 654.

illegally) in barges in the bayou.[101] Large amounts of creosote wastes were stored in the open partially on and off a cracked pad and were not removed for treatment until the State compelled removal by an administrative order.[102] There have been numerous fires and explosions at the plant.[103] Citizens at the public hearing likewise complained about fires and explosions at the facility as a reason for their opposition to granting MSP a BIF permit.[104] The company has taken steps over time, however, to reduce the occurrences or risks of fires and explosions.[105]

EPA believes this history of operation is relevant, although not decisive, in assessing MSP's status. It appears particularly relevant in assessing the primary purpose of the company's operations when it first began burning hazardous wastes. It appears that neither incoming nor outgoing materials were stored particularly securely, were allowed to remain for years at a time without being processed, and the kiln itself experienced losses of material through fires and explosions. These kinds of substandard operations, where there is no real attempt to shield supposedly valuable materials from loss, are evidence of a non-recycling purpose.

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[101] At one inspection, State inspectors noted that the alarm on the storage barge designed to sound when the barge was filled to excess had been turned off. When turned back on, it immediately sounded. MSP was nonetheless continuing to place hazardous waste in the barge. Trial transcript vol. 22 pp. 52-53 (testimony of Charles Bennett).

[102] Trial transcript vol. 3 pp. 51, 68, 71 (testimony of Kerry St. Pé); *id.* vol. 22 p. 86. The estimated size of the pile was an eight foot high pile stretching over a half acre. *Id.* vol. 22 p. 49 (testimony of Charles Bennett).

[103] Trial transcript vol. 3 p. 57 (testimony of Kerry St. Pé); *Id.* vol. 4 pp. 26-28 (testimony of Roy Varnado).

[104] Transcript of Public Hearing, pp. 82-83, 197.

[105] Trial Transcript vol. 22 p. 87, vol. 23 p. 28 (testimony of Charles Bennett).

i. Hazardous wastes may be burned for destruction if there are inadequate records to document alleged recycling activities.

EPA has explained that:

> [a]bsence of records regarding the recycling transaction is another indication of a sham situation. Records ordinarily are kept documenting use of raw materials and products. Records likewise are usually retained to document secondary material use and reuse. The Agency consequently views with skepticism situations where secondary materials are ostensibly used and reused but the recycler is unable to document how, where, and in what volumes the materials are being used and reused. The absence of such records in these situations consequently is evidence of sham recycling.[106]

MSP's records of the disposition of its combustion ash are insufficient. Although this ash is its alleged product, MSP keeps no records on the exact amounts generated.[107] MSP's "best estimates" [108] of what it has generated are also at odds with what it claims to have used. MSP's separate estimates of amounts sold and amounts transferred to RPI in fact exceed its estimate of the amount it generates from 26,000 to 61,000 tons.[109]

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[106] 50 Fed. Reg. at 638. *See also,* 40 C.F.R. § 261.2(f) requiring respondents to "provide appropriate documentation [] to demonstrate that the material [] is exempt from regulation."

[107] Trial transcript vol. 14 p. 43 (MSP stipulated that it estimates it produced 285,000 tons of ash); *Exhibit E-12* MSP's Response to Interrogatory #4 (MSP estimates it produced approximately 285,000 tons of ash).

[108] *Id.*

[109] Trial transcript vol. 25 pp. 96-98 (testimony of Henry Robards); *Exhibit E-11* (MSP's Response to Interrogatory 1.e); *Exhibit A-8* (Transcript of deposition of MSP's 30(b)(6) designee Henry Robards p. 87.)

EPA finds that MSP's record keeping fails to document "how, where and in what volumes" its combustion ash has been generated or used.[110] This lack of documentation is evidence that the hazardous wastes are not being recycled, but rather they are burned for destruction, since it is evident that accounting for the disposition of the recycled "product" is of no particular importance to MSP.

j. Similiarities between MSP's operations and those of hazardous waste incinerators support classification of MSP as an incinerator.

MSP calls attention to ostensibly unique features of its operation, such as kiln length, long residence time, countercurrent operation, and generation of a vitrified, glass-like material. These features, in the company's view, make its operation unlike those of commercial hazardous waste incinerators. EPA disagrees that MSP has design and operating features that make it non-classifiable as a device which incinerates hazardous waste. There was credible expert testimony at the civil enforcement proceeding that at least some hazardous waste incinerators have these same features. There are, for example, hazardous waste incinerators that operate in countercurrent mode and which have residence times approximately equal to MSP's.[111] Many hazardous waste incinerators have the same configurations, same types of waste analysis plans, and the same means of feeding incoming wastes.[112] Some commercial incinerators also slag their ash.[113] This ash is similar in appearance to MSP's slagged "aggregate," and meets the same specifications—the LDR treatment standards.

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[110] 50 Fed. Reg. at 638.

[111] Trial transcript vol. 7 p. 36 (testimony of Donald Corwin).

[112] Trial transcript vol. 5 pp. 31-40 (testimony of Joseph Santoleri).

[113] *Id.* vol. 6 p. 5.

MSP's operations are also unlike those of *bona fide* producers of secondary aggregate (i.e., *bona fide* aggregate produced from wastes). These producers size their material to desired industry specifications, and do not accept indiscriminate types and volumes of wastes.[114] For these reasons, a number of experts at the trial concluded that MSP was an incinerator.[115] EPA position is that there is nothing about MSP's design or operation that sets its activities apart from those of hazardous waste incinerators.

k. MSP cannot demonstrate a known market or disposition for its "aggregate."

It is MSP's ultimate burden to demonstrate a "known market" for its "aggregate."[116] Failure to do so is clear evidence of sham recycling.[117]

Although MSP claims to have a list of customers waiting to purchase its "products," the record demonstrates that the materials are not suitable for use as "aggregate" as that term is presently defined in industry, and therefore, has limited marketability. The mere fact that someone somewhere would buy an alleged product is not sufficient to demonstrate a market for the material. A manufacturer of aggregate that uses hazardous waste as an ingredient or as a fuel, must be able to demonstrate a market for its product in industries that traditionally utilize aggregate, for example, the highway construction, building construction or cement industries.

During the civil enforcement proceeding, MSP attempted to demonstrate a market for its material by

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[114] Trial transcript vol. 41 pp. 119-120 (testimony of Doss White).

[115] *Id.* at vol. 41 pp. 118-119; vol. 6 pp. 6-7 (testimony of Joseph Santoleri).

[116] 40 C.F.R. § 261.2(f).

[117] *Id.* and 50 Fed. Reg. at 642.

calling several past purchasers to testify to the usefulness *of the material and several expert witnesses to testify that* the material could be used in the asphalt and brick industries. However, even a cursory examination of the testimony on these issues reveals conflicting opinions regarding the possible usefulness of the material and further reveals that the marketability of the ash is purely speculative and that there is no "known" market for the ash.

Significantly, the largest past "purchaser" of MSP's ash simply returned the material to MSP.[118] The individual was actually involved in a joint venture with MSP using the "primary aggregate" as a solidifier for removing creosote sludges and creosote contaminated soils from defunct wood-treating lagoons. The MSP material was transported to the wood-treating site where it was and mixed with residual liquids or sludges in the lagoons. The creosote-laden material was then returned to MSP and reprocessed in the kiln. This is just redisposal of combustion ash. Consequently, the largest "purchases" of MSP's material never resulted in a true sale involving permanent disposition of the material.[119]

Subsequent purchasers testified that they used the material as a road base. One testified that he would still be buying the material if LDEQ had not prevented MSP from selling it. However, as predicted by EPA's experts,[120] the former customer admitted that he would not purchase the material if it was proven to be unsafe and another stated that he would never have purchased

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[118] Trial transcript vol. 28 pp. 51-65. (Testimony of Huey Stockstill.)

[119] Notably, Mr. Stockstill, now a producer of aggregates from natural materials, also testified on cross-examination that, he made all his products to meet certain construction specifications and that, in his opinion as an aggregate manufacturer, selling aggregate for two to three dollars a ton, as is MSP's practice, was not the proper way to run an aggregate business. *Id.* at p. 65.

[120] *Exhibit A-14.*

the material had he known there were questions concerning its lead content.[121] These purchasers also testified that the MSP "aggregate" had certain characteristics which were unsuitable for road construction. They stated that the ash failed to remain compacted after exposure to rain and that it became "mushy" after becoming moist.[122]

Far from establishing a known market for MSP's material, the testimony of the prior customers tended to underscore serious questions regarding the usefulness of the material and the marketability of the ash in general due to questions regarding its safety.

MSP next presented two experts in asphalt production. The first was associated with an asphalt testing laboratory that performed tests on asphalt made with MSP ash. The second built and sold asphalt manufacturing plants. (It should be noted that MSP had previously contacted an asphalt engineer who determined that the material was not suitable for use in hot mix asphalt.[123] Both testified that MSP's interest in using the ash in asphalt had been piqued during the period surrounding the temporary injunction proceeding in the fall of 1990 and shortly before the civil trial in April of 1994.[124]

The second expert testified that MSP had considered building its own asphalt plant, although he encouraged the company to sell its ash to local asphalt manufacturers instead. In December of 1990, he wrote MSP a letter recommending the company "perform a quick market study" to determine the feasibility of installing an asphalt

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[121] Trial transcript vol. 28 p. 94 (testimony of David Robichaux) and Trial transcript vol. 34 p. 19 (testimony of Parker Conrad.)

[122] Trial Transcript vol. 28 p. 81 to end (testimony of David Robichaux.) Trial Transcript vol. 34 p. 4-19 (testimony of Parker Conrad.)

[123] *Exhibit A-24* (Barry L. Moore Report).

[124] Trial transcript vol. 34 p. 38 (testimony of James Brock) and vol. 30 p. 64 (testimony of Richard Root).

plant.[125] The letter suggested that MSP make certain inquiries to determine the marketability of asphalt in the Morgan City area. The expert stated that he had not undertaken the market study[126] and later in the trial, the president of MSP confirmed that no marketability study had been performed.[127] Consequently, MSP was unable to establish a known market for asphalt made with its material.

It is also important to note that, not only is the use of MSP's material in asphalt mix hypothetical, it is arguably nothing more than surrogate disposal. The first asphalt expert acknowledged that he had made only laboratory samples of asphalt using MSP material but had never field tested the asphalt mix. In making the samples, he used a mixture of 35% MSP material and 65% other natural aggregates. MSP's second asphalt expert conceded that MSP would need to purchase from 15% (if MSP was able to obtain large amounts of old asphalt to mix with its material) to 65% of its aggregate from off site if MSP decided to build its own asphalt plant.[128] He also stated that one needed to limit the amount of waste material used in asphalt so it would not harm the quality of the asphalt, but that asphalt was a "good place to get rid of materials when it does not hurt the quality of the road. . ."[129] The first asphalt expert also testified that "almost anything" can be used as asphalt cement including "various waste materials" such as fly ash from power plants.[130] And on cross examination, he conceded that

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[125] Trial transcript vol. 33 p. 40 (testimony of James Brock).

[126] *Id.* at 40.

[127] Trial transcript vol. 42 p. 66-67 (testimony of John M. Kent, Sr.).

[128] Trial transcript vol. 34 p. 42 (testimony of James Brock).

[129] *Id.* at 54.

[130] Trial transcript vol. 30 pp. 69 and 71.

these waste materials were most likely just "along for the ride." [131]

EPA interprets these statements as meaning that use of waste materials in asphalt is simply a type of disposal. Using waste material in this fashion does not transform the waste into a "product" and does not constitute a legitimate "market" for the material. The waste is being used, not because it is the best choice (or even a good choice) of materials for asphalt production, but because the material needs to be disposed of and using small amounts of the material may not damage the asphalt.[132] As a result, EPA would not find evidence that a waste material can be used in asphalt manufacturing any more persuasive in demonstrating a "known market or disposition" for the material than evidence of a "market" for use as general fill material or any other use that is merely a form of disposal.

Of the expert testimony offered by MSP on the issue of demonstrating a market for its material, EPA found most revealing the testimony of an engineer employed by MSP's primary contractor.[133] This witness had by far the most extensive history in dealing with MSP's ash. He disclosed that, despite beginning "aggregate" production in mid-1985, MSP did not test the material to determine whether it had any potential use until 1987 and even

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[131] *Id.* at 105.

[132] The brick expert called by MSP testified that bricks could be made using MSP material as a filler and that the bricks met ASTM standards. He also testified that, just as in asphalt production, waste materials had long been used as fillers in brick production. Again, EPA would view this use as surrogate disposal. This testimony became irrelevant, however, when MSP's owner testified that he had no intention of making bricks with MSP ash. Trial transcript vol. 42 p. 48 (testimony of John M. Kent, Sr.)

[133] Trial transcript vol. 29 (testimony of V. E. Sendukas). Mr. Sendukas is employed by Woodward-Clyde an environmental consulting firm retained by MSP.

then, only four samples of the "primary" material were tested.[134] From this limited analysis, the witness concluded that the "primary aggregate" "might" be useful as a mineral filler in asphalt, and that it could be used as soil cement and as general fill material.[135]

On cross examination, however, the witness admitted that he had not tested material as a mineral filler in asphalt, and that it had never been used for that purpose.[136] He further stated that he had not performed field work with the material as soil cement. He also conceded that soil cement and general fill material are the two construction uses for aggregate with the fewest specifications and, therefore, the variability of MSP's material would be less likely to prevent such uses.[137]

When questioned regarding MSP's "slagged aggregate," the witness admitted that the vitrified material failed both the La.DOTD abrasion and soundness tests. He further acknowledged that the La.DOTD would not allow the material to be used as concrete aggregate or asphaltic concrete for State projects and that, even if the material met La.DOT standards for these products, MSP does not produce sufficient quantities of "aggregate" to contribute significant amounts to State projects.[138] In EPA's opinion, the witness charitably summarized the marketability of MSP's material when he admitted that the ash simply has "limited potential as a construction material." [139]

Based on the record including evidence produced at trial by both MSP and the United States, EPA concludes

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[134] *Id.* at p. 25-6.

[135] *Id.* at 35 and 38.

[136] *Id.* at vol. 30 p. 26.

[137] *Id.* at 12-13.

[138] *Id.* at vol. 29 pp. 52-54.

[139] *Id.* at vol. 30 p. 26.

that MSP is unable to establish a known market for its material.

EPA concludes that, taken together, all of these facts show that MSP is properly classified as a device which is incinerating hazardous wastes, not one engaged in manufacturing. The unit is thus not an integral component of a manufacturing process, and hence not an industrial furnace, because MSP's process is not properly regarded as manufacturing at all. Most obviously, the magnitude of its waste destruction activities dwarfs any claim that it is engaged in a manufacturing operation. It is equally obvious that many hazardous wastes are burned for the sole purpose of destruction. Many hazardous wastes are also unsuited for use in aggregate production, or even unsuited to produce fill material (assuming generation of fill dirt can be considered to be a production process.) Hazardous wastes are burned in excess of amounts needed to impart any useful property to the combustion ash. All of the company's profits, and virtually all of its hundreds of millions of dollars of income, come from its hazardous waste combustion activities. Hazardous wastes are burned in excess of amounts needed to impart any useful property to the combustion ash. Hazardous constituents in the combusted wastes typically contribute nothing of value (and often contribute detrimental properties) to an end product, and are just being gotten rid of—abandoned by incineration in the language of the rules. The hazardous wastes are not selected with an eye to their contributions to an end product, but are selected indiscriminately.

The material MSP generates is not suitable for any use but as a fill material, a marginal activity that EPA has traditionally viewed as probably not being recycling at all. This inference is particularly compelling when the material meets no commercial specifications and is highly variable. The material may be unsuited even for use as fill dirt because of its high toxic metal concentrations.

There is also no clear market for use of the material as fill (or for any other purpose).

EPA draws from these facts the inference that the MSP process is being used to incinerate hazardous wastes, and that the MSP combustion unit is an incinerator, not an industrial furnace. It consequently is ineligible for a permit as an industrial furnace.

B. MSP's "aggregate" is not a Legitimate Product (MSP fails to satisfy the use constituting disposal regulations even if they were subject to those regulations)

MSP has argued that it is a legitimate recycler if it satisfies the requirements of 40 C.F.R. § 266.20 of the regulations, the rules dealing with recycled materials used in a manner constituting disposal. EPA does not believe that these rules even apply. The regulations at 40 C.F.R. § 266.20 apply only to "recyclable materials" (266.20(a)) which are "hazardous wastes that are recycled."[140] This does not include wastes that are being abandoned by being disposed of (through incineration in the case of MSP.)[141] However, assuming that the rules apply, EPA believes that MSP fails to satisfy them. This is still more evidence that MSP is not operating a manufacturing process and is not eligible for a permit as an industrial furnace.

1. MSP cannot demonstrate that the "aggregate" is produced for the general public's use.

In promulgating this requirement, EPA explained that a waste derived product must be marketed for general use; the product cannot be produced merely for use by the manufacturer.[142] As discussed earlier, MSP does not market its "aggregate" to the general public nor to anyone. Furthermore, at present, pursuant to a consent order,

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[140] 40 C.F.R. § 261.6(a)(1).

[141] 40 C.F.R. § 261.2(b)(1).

[142] 50 Fed. Reg. at 647.

MSP sells its "aggregate" only to itself as Recycling Park, Inc. Consequently, MSP clearly does not presently meet the first element of the § 266.20(b) exemption.

Prior to entering into the consent order in 1991, MSP had not sold its material since May of 1989. At that time, MSP ceased "aggregate" sales in response to an order issued by the Louisiana Department of Environmental Quality (LDEQ).[143] Concerned over high levels of metals in MSP's materials, LDEQ ordered the company to immediately cease sales of the material until the Department determined that the material met all State and federal regulations and until MSP proved that the material did not pose a danger to public health and the environment.

After the issuance of this order, MSP made no attempt to market or sell its material. In July of 1991, an MSP official remarked to the press that the company was preparing to move the material and to possibly try to sell the material. In response, the United States filed for a temporary restraining order to prevent such activities.[144] This action ultimately resulted in the consent order discussed above.

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[143] *Exhibit A-25.* The LDEQ questioned the safety and legitimacy MSP's material as early as August of 1985. At that time, an LDEQ compliance order, *Exhibit A-30,* required MSP to test the "material which exits the kiln" within ten days of the issuance of order to determine the presence and concentration of hazardous constituents, and "provide a detailed report" to LDEQ "to substantiate that the burning of the hazardous waste fuels is legitimate energy recovery or recycling in a production process and not waste destruction. In the report, [MSP] shall at a minimum provide information relating to operation of the facility, degisn of the facility, ability to market the end product, . . . and the operational problems leading to the violations reference [in the order]." In lieu of providing such details to LDEQ, MSP was given the option of disposing of the "material which exits the kiln" in a hazardous waste landfill. LDEQ records list the status of this order as unknown.

[144] *Exhibit A-31* (United States' Motion for Temporary Restraining Order).

Without question, MSP has not, since May of 1989, produced a "product" for the general public's use.

2. MSP cannot demonstrate that the hazardous waste used to produce the "aggregate" has undergone a chemical reaction and has become "inseparable by physical means."

This standard requires that the hazardous constituents in the waste-derived product must not be able to separate from the material thereby posing harm to public health and the environment.

Throughout the years that EPA has examined MSP's operation, the Agency has engaged numerous experts to analyze MSP's operation and its material. Noted experts in the fields of geology and chemistry have examined MSP's "aggregate" under electron miscroscope, analyzed the physical durability of the material, and performed various analyses on the material. One expert concluded that, although MSP's "slagged aggregate" forms a glass-like matrix which incorporates toxic metals, the material is extremely friable and abrades easily. As the glassy matrix breaks down, the metals are released from the matrix into the environment. The expert further concluded that the toxic metals in the "primary" aggregate, are not encased in a matrix and are completely available to enter the environment.[145] Another expert found that hazardous constituents leached from the MSP material when the material was exposed to water.[146] During the civil enforcement proceeding, the expert in the field of chemistry testified that recent testing of the MSP's vitrified material confirmed that toxic metals are physically separable from the glassy matrix of the slag. This was evidenced by the fact that TCLP analysis of the material

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[145] *Exhibit A-32.*

[146] *Exhibit A-33* (Stratton Report).

showed increased metals levels after the material was crushed.[147]

Based on the conclusions of these experts, it appears that the material is not inseparable by physical means as envisioned by 40 C.F.R. § 266.20(b).

3. MSP cannot demonstrate that the "aggregate" consistently meets the applicable LDR treatment.

EPA and LDEQ have inspected the MSP facility and sampled MSP's "aggregate" on numerous occasions.[148] Many of the "aggregate" samples tested by EPA exceeded the LDR treatment standards for the wastes which MSP burns in its kiln.[149] In fact, a substantial number of the samples exceeded the toxicity characteristic level for lead and cadmium (meaning that the material is hazardous waste by definition).[150] In the recent civil proceeding, the jury agreed that these materials exceeded toxicity characteristic levels, and consequently LDR treatment standards; the Court has assessed a $500,000.00 penalty against MSP for failure to comply with applicable LDR treatment standards.[151]

At one time, MSP claimed that much of its "aggregate" was not subject to LDR treatment standards because it segregated LDR wastes from non-LDR wastes and stored "aggregate" produced from land disposal restricted waste separately from that produced from unrestricted waste.[152]

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[147] Trial transcript vol. 11 p. 22-23 (testimony of Douglas Kendall.)

[148] *Exhibit A-34* (Summary of EPA and LDEQ inspections of MSP facility).

[149] *Exhibit A-35* (EPA's summary of analytical results of "aggregate" samples).

[150] *See* 40 C.F.R. § 262.24.

[151] *Exhibit E-2* (Judgment On Main Demand: Clean Air Act, Clean Water Act, Storage of "F" and "K" Wastes and Land Ban Violations; Judgement On Counterclaim Against Southern Wood Piedmont Company.)

[152] *Exhibit A-4.*

It is EPA's finding that, during the relevant time period (August of 1988 (when the first wastes accepted by MSP became land disposal restricted) and August of 1991 (the time at which MSP entered into a consent order agreeing that all its ash would meet the LDR treatment standards for hazardous waste K001 or the lowest treatment standards for any waste burned[153])), MSP did not take proper precautions to segregate LDR and non-LDR wastes and that all the "aggregate" produced by MSP was subject to the LDR treatment standards for the LDR wastes it burned.[154] Thus, the samples of material which tested above the LDR treatment standards did not meet this § 266.20(b) requirement.

As regulations changed, many more of the wastes routinely burned by MSP became restricted from land disposal. In response, MSP presently applies to its "aggregate" the lowest LDR treatment standards for the wastes burned.[155] During the preliminary injunction hearing, MSP represented that it would undertake strict testing procedures to insure that any material "certified for sale" (and subsequent removal to the Recycling Park, Inc. location) would meet all LDR treatment standards. However, at the civil trial the United States introduced evidence that two large piles of ash which MSP had "certified for sale" failed to meet LDR treatment standards. And the jury verdict contained a finding to that effect. The broad range of wastes burned by MSP produces an extremely variable

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[153] *See Exhibit A-26* (Court Order dated August 2, 1991.)

[154] *Exhibit A-36* (Transcript of testimony by Gary Miller during preliminary injunction hearing) (Using various MSP operating records, the witness traced LDR wastes through MSP's process thereby proving that LDR wastes and non-LDR wastes were mixed together in the mixing barges and in the kiln.) Manifests accompanying hazardous waste received by MSP during this time period indicate that the facility was burning K001 and F006 restricted wastes. Since that time, many more of the wastes MSP burns have become land disposal restricted. As a result, MSP no longer claims that it segregates restricted wastes from non-restricted wastes.

[155] *Exhibit A-8.*

residue. The evidence adduced at trial confirms that MSP can not consistently insure that its material meets LDR standards, even when it is adhering to its strictest testing protocol.

Given MSP's history of exceeding LDR treatment standards, MSP cannot claim that its "aggregate" consistently meets the final requirement of the § 266.20(b) exemption. Thus, EPA's view is that because MSP is not a legitimate manufacturing process and does not produce a legitimate product, § 266.20(b) is not even relevant in assessing their regulatory status. Even if it were, the company does not satisfy the conditions of the provision.

C. Marine Shale's Oxidizer Units Themselves Are Incinerators

As described earlier, MSP also operates two hazardous waste-fired oxidizers which are connected to its main kiln. MSP over time has ascribed varying functions for these oxidizers. One function is to slag the "aggregate" so as to meet land ban treatment standards. Another is to make the aggregate usable. A third is as air pollution control devices for control of organic emissions. MSP has maintained, however, that these oxidizers are part of a single aggregate kiln system and so are part of an industrial furnace and entitled to interim status and a permit under the BIF regulations. EPA finds that the oxiders must be classified as incinerators.

Industrial furnaces are defined in 40 C.F.R. § 260.10 as being one of an enumerated list of devices that are an integral part of a manufacturing process and recover energy or materials. These devices are described as individual units: "cement kilns," "blast furnaces," and, for purposes relevant here, "aggregate kilns." The literal reading of this rule is that only a single device meeting the description in the rule can be an industrial furnace. The definition says "aggregate kilns" it does not say "aggregate kilns plus hazardous waste-fired oxidizers". There-

fore, read literally, the rule indicates that whatever the status of MSP's kiln, the oxidizers are not industrial furnaces.[156]

EPA has, however, indicated that industrial furnaces include one or more devices and that these devices typically include a number of parts. For example, the Agency has indicated that precalciners used to process raw materials are parts of cement kilns,[157] and that all industrial furnaces typically operate with a series of air pollution control devices to control organic, particulate, and acid gas emissions. MSP argues, based on these statements, that all of the enumerated devices in the definition of industrial furnace must be read to be systems of devices (i.e. aggregate kiln systems, cement kiln systems, etc.) and that so long as the added combustion device is part of the manufacturing process, it must be evaluated as part of the industrial furnace.[158]

MSP's argument is misplaced, and does not accurately reflect EPA's interpretation. The rules do not say, nor has EPA ever stated, that separate hazardous waste-fired combustion units such as MSP's oxidizers can be added to an industrial furnace and thereby be classified as an industrial furnace so long as the device contributes to the manufacturing process. It is the Agency's interpretation, explained fully in a recent memorandum from EPA's Director of the Office of Solid Waste to EPA Region 6's Director of the Hazardous Waste Management Division, that the list of industrial furnaces applies on a device-by-device basis whenever the devices are separately combusting hazardous waste (i.e. combusting a hazardous

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[156] Initial Statement p. 27.

[157] 54 Fed. Reg. at 43671 (Oct. 26, 1989).

[158] *Exhibit E-3* (Opposition of MSP to the Government's Motion for Judgment Under Federal Rule of Civil Procedure 54, May 27, 1994.)

waste not derived from the hazardous waste burned in the kiln itself).[159]

As stated in that memorandum, not only is this interpretation consistent with the language of the rules (i.e. the definition of industrial furnace), but with statutory goals and policies. Hazardous waste combustion can only be performed pursuant to stringent regulatory control.[160] The Agency's official policy is not to allow new hazardous waste combustion units to begin operating indiscriminately.[161] Nor did the Agency consider the effect of separate hazardous waste burning combustion units on industrial furnace emissions when developing the BIF standards (with the exception of cement kiln precalciners).[162]

The memorandum also makes clear that this interpretation covers the case of a second hazardous waste-fired combustion device. If the device is not adding a hazardous waste different from the waste burned in the industrial furnace proper (for example, the device is fired with fossil fuel although it does receive hazardous waste-derived emanations like scrubber water from the industrial furnace proper), it would be regulated as one system because core RCRA values cited above relating to combustion of hazardous waste are not implicated. EPA's previous statements relied on by MSP describing such

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[159] *Exhibit E-4* (Memorandum from Michael Shapiro, Director, Office of Solid Waste to Allyn Davis, Director, Hazardous Waste Management Division, Region VI, July, 1994.) The only exception is if EPA has indicated unequivocally (normally during a notice-and-comment rulemaking) that the definition of the industrial furnace type contemplates an additional device (the one example where this has occurred being cement kiln precalciners.) *Id.*

[160] RCRA sections 3004(o)(1)(B), 3004(q).

[161] *Exhibit E-8* (U.S. EPA Draft Statement on Combustion Strategy, May, 1993.)

[162] *See generally*, Memorandum at p. 4.

things as air pollution control equipment as part of the industrial furnace do not say that these devices can be hazardous waste-fired and still be considered to be an industrial furnace.

As mentioned earlier, the District Court in the civil enforcement case, in a finding not reduced to judgment, indicated that he would not rule as a matter of law that MSP's oxidizers are not industrial furnaces. This ruling was based solely on the Court's belief that EPA had interpreted the rules to allow such a view in a 1992 internal memorandum regarding the Giant Cement facility.[163] In fact, the Court misunderstood this memorandum. The Agency's interpretation was, and is, that all that was at issue regarding Giant Cement was the question of what emission standards to apply when an incinerator and an industrial furnace each burn hazardous waste and the emissions are combined and exit through a single stack. The 1992 memorandum does not say that incinerators can be reclassified as industrial furnaces for purposes of eligibility for interim status or for permitting. This ineligibility is explained in detail in the July, 1994 memorandum from the Director of the Office of Solid Waste.

Accordingly, EPA is applying the rules as written and as interpreted consistently and so finds that the hazardous waste-fired oxidizers are not industrial furnaces and are therefore ineligible for an industrial furnace permit.

D. Marine Shale's Prior History Does Not Warrant Issuance of Another Environmental Permit by EPA

As stated in the Initial Statement, even if MSP had submitted an otherwise approvable application, MSP's history of repeated noncompliance with environmental permits and regulations and material misrepresentations and

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[163] *Exhibit E-5* (Memorandum from Jeffrey D. Denit, Office of Solid Waste, to Donald J. Guinyard, Director Hazardous Waste Management Division, EPA Region IV, August 11, 1992.)

omissions in mandatory information submissions are so egregious that the Agency does not believe that any set of additional permit conditions would be adequate to ensure protection of human health and the environment; accordingly EPA denies MSP's RCRA permit application pursuant to the Agency's omnibus authority.

Two other permits were issued to MSP by EPA and its authorized state—an NPDES permit and an air permit—under which MSP has consistently failed to meet its obligations. In addition MSP has been the subject of criminal prosecution as a result of its intentional environmental violations and has been debarred from the federal procurement system. Taken together, MSP's instances of past noncompliance and misrepresentation rise to the highest level of disregard for applicable environmental laws and regulations. Under its omnibus permitting authority,[164] EPA shall add such terms or conditions as are necessary to protect human health and the environment. In extreme cases, where the Agency cannot craft conditions that will ensure protection (e.g., where a company shows a pattern of noncompliance and misrepresentation), the Agency can deny a permit under omnibus authority. Here, EPA denies MSP's permit application based on MSP's demonstrated inability or corporate unwillingness to comply with applicable environmental regulations, including permitting requirements, and to report information to EPA accurately and honestly.[165] The scope of EPA's omnibus authority is fully set out

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[164] EPA's "omnibus authority" is found in Section 3005(c)(3) of RCRA and is codified at 40 C.F.R. § 270.32(b)(2). All subsequent references to "omnibus authority" correspond to the listed citations.

[165] Many citizens testifying at the public hearing stressed the appropriateness of denying MSP's application because of its dismal compliance record. March 14, 1994 Public Hearing Trans. pp. 63, 69, 71, 82, 100, 143, 204.

in the Statement of Basis for the Proposed Denial of MSP's permit application.

1. MSP's History of Misrepresentations when Applying for Permits, or not Applying at all for Needed Permits

MSP has demonstrated a consistent history of either misrepresenting its activities in order to obtain environmental permits, or simply not obtaining needed permits at all. It is to be remembered that any type of environmental enforcement system is in large measure self-enforcing. Because EPA and states cannot constantly monitor every facility, there has to be some measure of trust in members of the regulated community. MSP's conduct regarding applications for permits demonstrates why it should not be permitted.

In order to begin operations, MSP told state officials that it would be burning oil drilling wastes, and did not disclose the true nature of its activities.[106] MSP also began storing massive quantities of hazardous wastes without a permit even though it was ineligible for interim status as a storage facility. For this reason, the company has, in fact, recently been found liable for illegal storage of hazardous waste.

MSP also began operations as a hazardous waste incinerator without applying for a permit even though it was ineligible for interim status. The applicable legal test in 1985, for whether a combustion device was an incinerator, was whether the primary purpose of its operations was to thermally break down hazardous wastes. It is evident that this was the case, as shown, among other things, by burning of most wastes for outright destruction, producing a "product" of no use except as fill material for which there was no market, making no attempt to in-

[106] Trial transcript vol. 42 pp. 57-58 (testimony of John W. Kent, Sr.).

vestigate uses for its combustion ash until 1987,[167] and illegally disposing of wet-scrubber sludge on its property (terming it "aggregate" although admitting later it was not.)[168] Again MSP's pattern is to start operations without regard to the law.

The same pattern of misrepresentation and outright disregard for the law holds true for Clean Water Act permits. MSP has sought to operate under a permit originally issued to the Pelican Lime Kiln, which reflects only combustion of oil and drilling muds. MSP did not amend its permit application to disclose that it was processing hazardous wastes exclusively when it applied for an National Pollutant Discharge Elimination System (NPDES) permit for a non-hazardous oil field incineration facility. MSP has also discharged massive quantities of hazardous waste contaminated non-contact cooling water even though it had no permit to do so.

With regard to the Clean Air Act, MSP's claim that it was a minor source and therefore subject only to the minor source permit requirements under the Prevention of Significant Deterioration (PSD) program was another misrepresentation. It has been determined that MSP is a major source subject to the applicable permitting requirements. It also disregarded requirements that it obtain permits under the state SIP for 29 miscellaneous sources of air emissions at its plant.

Most recently, in its initial BIF certification of compliance, MSP again misrepresented its activities. MSP based its certification on mode of compliance available only to lightweight aggregate kilns. MSP is admittedly not a lightweight aggregate kiln, and is not entitled to the associated exemption.

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[167] *See*, Trial transcript vol. 29 p. 24 (testimony of V.E. Sendukas).

[168] *Id.* vol. 23 p. 8 (testimony of Charles Bennett).

These actions are not isolated, unintended instances of mistake. As the District Court in the civil enforcement action stated: "[w]hat comes through in this, to me [] is not just a disregard for the regulatory process, is virtually contempt, a sense of arrogance about it, 'we're going to operate, we need this permit, yeah, okay, let's operate and we'll operate for a year or two while we're trying to get a permit.' Everybody else has to get a permit before they can operate, but Marine Shale doesn't. . . . What you did do, and which is very serious, is simply to ignore the law and to operate with contempt, and that is not going to be accomplished in this court." [169] EPA agrees with this assessment.[170]

2. Termination of MSP's NPDES Permit.

The history of EPA's concerns with MSP's NPDES permit are fully set out in the Statement of Basis for the Proposed Denial.

As stated in that document, at no time during the processing of its NPDES permit application did MSP ever disclose that it was receiving and processing hazardous waste. However, after submission of its permit application, despite its self-description as processing only non-hazardous drilling fluids, MSP fundamentally changed its operations by managing *exclusively* hazardous waste in enormous quantities. It failed to amend its application to reflect its hazardous waste treatment activities. A later investigation by EPA's NPDES permitting staff found manifests showing that MSP received 439 shipments of hazardous waste while its NPDES application was pending. MSP has continued to receive and manage hazardous waste until the present time. MSP also sent out numerous letters soliciting business as a hazardous waste proc-

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[169] Trial transcript of July 8, 1994, pp. 88-90.

[170] The Court recently assessed an $8 million penalty against the company for these violations. *See Exhibit E-2.*

essor. Finally, again during the pendency of its application, MSP failed to notify EPA that it was discharging toxic pollutants in excess of reportable quantities. Each one of these failures violated the requirements of 40 C.F.R. § 122.64.

After considerable investigative effort by EPA-Region 6's NPDES permits staff, MSP's discharge permit was terminated and its application for permit renewal was denied on July 2, 1991 by written decision of the Director of EPA-Region 6's Water Management Division. The basis for the denial/termination decision was MSP's constructive misrepresentations regarding the nature of its operations and its failure to disclose information during the permit application process. This denial is presently on appeal to EPA's Environmental Appeals Board (EAB).

These violations and material omissions by MSP are fundamental and cut across program lines; the pattern of concealing and misrepresenting information as seen in the water program, is of equal concern to the RCRA program. It supports today's determination that there are no permit conditions that can be added to a RCRA permit that would ensure protection of human health and the environment, and demonstrate to EPA that the facility should not be issued a RCRA permit.

3. MSP's Continuing Air Permit Violations.

MSP has also demonstrated its unwillingness to comply with permit requirements under the Clean Air Act ("CAA").

As fully set out in the Statement of Basis for the Proposed Denial, before constructing any new major facility (or major modification to an existing major facility), the operator of the facility is required to identify the potential increase in emissions that is anticipated.

If the source is a major source or if the proposal involves a major modification, more extensive permitting

and more stringent pollution control requirements apply than would otherwise be the case with "minor sources." Because it would be impossible for EPA and the state regulatory agencies to know in advance the potential impact of proposed new facilities, the Prevention of Significant Deterioration (PSD) program, like most environmental regulatory programs, is essentially a "self-reporting" system. The burden for projecting anticipated pollution from proposed new construction rests with the regulated industry. Several provisions in the Louisiana State Implementation Plan ("SIP") require that the facility's operator provide detailed emission estimates about the effects of any proposed construction.

At all times after MSP's acquisition of the facility, it actually emitted and/or had the potential to emit at a rate that qualified it as a "major emitting facility" for purposes of PSD permitting requirements. In January 1985, MSP modified the facility by physically changing the nature of its operation from that of a lime processing plant to an oil field waste incineration facility and, subsequently, to a facility that incinerates solid and mixed hazardous waste. MSP's modification of its plant in January 1985 was a "major modification" for which a PSD permit was required. However, MSP did not apply for a PSD permit for the "major modification" of its facility, already considered to be a major source, and commenced operation without such a permit. From 1985 to the present, MSP has modified the facility on numerous occasions, and increased its actual and/or potential emissions.[171] In addition, MSP has incinerated additional types of materials that varied the amount and nature of air pollutants emitted by the facility. Under the Louisiana SIP dealing with PSD provisions, any change in operation that results in the emission of a previously unemitted pollutant requires a permit modification. MSP has never applied for

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[171] *Exhibit A-47* of Administrative Record—(MSP Stack Tests).

a PSD permit and continues to refuse to do so, claiming instead that is a "minor source."

MSP also violated the SIP by failing to get the required permit for construction of two new oxidizer units. It notified LDEQ by letter dated November 25, 1987 that it had constructed and intended to operate two new oxidizers. MSP did not have the permits required for such modifications at the time they were undertaken. MSP still does not have all of the permits required under state and Federal law for such modifications, and has been in violation of the CAA and the Louisiana SIP since January 1985 when it first modified the facility and for each subsequent modification for which the appropriate permit has not been issued.

Had MSP operated as the law requires, it would have had to install optimized air pollution control equipment before commencing hazardous waste combustion operations, and would have had to operate in conformance with emission limits established through the PSD process. MSP has evaded these requirements for years.

The company also operates 29 other sources at the facility (chiefly hazardous wastes storage units, such as its huge mixing barge) that require permits under the State SIP before these sources can be used. MSP failed to obtain permits for any of these units, and indeed, has not even applied for permits for them. This has again resulted in years of uncontrolled releases of hazardous air pollutants and criteria pollutants from these units.

Where MSP has obtained CAA permits, they routinely violate permit limitations by enormous amounts. MSP presently holds a State permit under the Louisiana SIP as a "synthetic minor" source yet it routinely emits in concentrations grossly in excess of allowable permit limits.

As with the Clean Water Act violations discussed above, EPA believes the violations by MSP of the Clean Air Act

are egregious, repeated and intentional. These Clean Air Act violations demonstrate a fundamental unwillingness to conform with the requirements of environmental regulations and statutes and support EPA's conclusion that permit conditions cannot be crafted that will ensure protectiveness, and this supports EPA's decision to deny MSP's RCRA permit application. Again, EPA's concerns with respect to violations of the CAA were addressed by the Court in the enforcement proceedings. During that proceeding the judge flatly stated that "[t]he difference is that you're operating without a permit" and "the fact of the matter is, you have no authority to operate at all."

4. MSP's Criminal Convictions and Ongoing Debarment from Federal Participation

On July 24, 1989, MSP pled guilty to three criminal counts of knowingly violating certain environmental statutes, specifically, RCRA, the Refuse Act of 1899, and the Rivers and Harbors Act of 1899.[172] During sentencing on September 19, 1989, MSP received a criminal fine of $1,000,000.

Criminal convictions, such as the above, are a cause for debarment under 40 C.F.R. § 32.305(a)(4) and Federal Acquisition Regulation ("FAR") Subpart 9.406-2 (a)(4). These sections provide that EPA [173] may impose debarment on the basis of a conviction for an offense indicating a lack of business integrity or honesty that seriously and directly affects present responsibility. Debarment prohibits a debarred entity from participation in Federal assistance, loan and benefit program activities and

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[172] *Exhibit A-42* of the Administrative Record (Plea Agreement, Bill of Information, and Sentencing Memorandum in Cause No. 89-60041-01).

[173] The Director of the Grants Administration Division of EPA has authority for suspension and debarment pursuant to 40 C.F.R. Part 32 and 48 C.F.R. Subpart 9.4.

from direct Federal procurement for a specific period of time, generally not more than three years.

As a result of its criminal convictions, MSP was debarred from federal participation for the maximum time period of three years from the date of the debarment determination.[174] The determination noted MSP's numerous environmental violations, its high level of culpability, and the inability of MSP to show that its corporate attitude towards compliance with environmental laws had improved since the time of its criminal conviction. "A corporate policy of disregard for compliance with environmental laws in the quest for greater profits may well result in impairment of the environment and the public health of the surrounding community." [175]

The findings and conclusions that provided the basis for MSP's criminal convictions and subsequent debarment further demonstrate MSP's fundamental unwillingness to comply with environmental laws and regulations. MSP's corporate disregard for environmental laws is intrinsic and continuing. Yet again, MSP was found to be out of compliance with environmental statutes and regulations. EPA has no basis upon which to conclude that MSP's future conduct and attitude toward compliance will vary fundamentally from that which formed the basis for its criminal conviction and debarment.

5. MSP's Misrepresentations in its Initial BIF Certification of Compliance

As fully set out in the Statement of Basis for the Proposed Denial, MSP's initial certification of compliance

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[174] MSP's debarment continues in effect until November 22, 1994, three years from the date the debarment decision was signed. *See Exhibit A-43* of the Administrative Record (Determination dated November 22, 1991 in Case No. 88-0033-00 and supporting documentation, including Final Reply Memorandum and Action Referral Memorandum).

[175] Initial Statement p. 23.

under the BIF rules is false. As stated above, in its BIF certification of compliance, MSP misrepresented its activities. It based its certification on mode of compliance available only to lightweight aggregate kilns. MSP is admittedly not a lightweight aggregate kiln, and is not entitled to the associated exemption.[176]

The result of this misrepresentation is that MSP sought to avoid the requirement that it continuously monitor ash content of the hazardous wastes that it burns in order to verify that it meets the emission standards for particulate matter (PM).[177] Eliminating this requirement is potentially serious for at least two reasons. It significantly reduces the ability to continuously monitor compliance with the PM standard (the only other parameters available for continuous monitoring being those related to performance of air pollution control devices). More ominously, by eliminating an ash monitoring requirement, MSP could conduct its compliance test with low ash hazardous waste thereby establishing lax requirements for air pollution control equipment parameters, and then resume burning high ash hazardous waste during normal operation. Since PM cannot be monitored continuously at the stack, and the compliance test would have established loose air pollution control device parameters, the company could use this means of largely evading the PM requirement.[178] Compliance with PM limits is, of course, a critical part of the Agency's strategy for controlling toxic metals and toxic organics entrained on particulate matter, as well as controlling particulate emissions them-

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[176] Trial transcript vol. 52 p. 26 (MSP counsel admits the company submitted a false Certification of Compliance).

[177] 56 Fed. Reg. at 7146 (February 21, 1991) and 40 C.F.R. § 266.103(c)(1)(iv).

[178] *Cf. Horsehead Resource Development v. Browner*, 16 F.3d 1246, 1263 (D.C. Cir. 1994) (It is legitimate for EPA to structure BIF rules to eliminate the possibility of trial burns being used to obtain lenient unrepresentative emission limits.)

selves.[179] EPA finds that MSP's attempts to evade these requirements are serious, reprehensible, and an indication that the company's philosophy of wholesale regulatory evasion has not altered.

Based upon the concerns detailed in the Statement of Basis for the Proposed Denial, it is EPA's determination that even if MSP otherwise qualified for a BIF permit, which it does not, MSP's intentional misrepresentations during the prior NPDES permit issuance process and its flagrant past noncompliance with other EPA-issued and state-issued permits as well as its noncompliance with the very BIF requirements under which it is applying for this permit, demonstrates its incapacity or its corporate unwillingness to comply with any permit conditions that EPA could impose pursuant to the regulations or its omnibus authority. Therefore, pursuant to its omnibus authority, EPA hereby denies MSP's application for a permit to operate its facility as an aggregate kiln.

IV. CONCLUSION

EPA concludes that it should deny MSP's application for a RCRA permit. First, MSP does not operate a BIF. EPA finds that MSP is an incinerator that is slagging and illegally disposing of its ash. MSP has burned and continues to burn substanial volumes of hazardous wastes in order to destroy those wastes. It solicits and burns hazardous wastes indiscriminately, without any formula or other specifications to ascertain wastes' suitability for an end product. These hazardous wastes contribute properties that impede the ash's use for anything but general fill material, and even contribute properties that impede that most marginal of uses (including making the material unsafe). Hazardous wastes are used in excess of those needed to produce a product. Hazardous constitutents in the wastes, for the most part are simply being abandoned: they contribute no properties of value and actually impart

[179] 56 Fed. Reg. at 7144.

undesirable properties to the combustion ash. MSP also cannot even account for the disposition of many thousands of tons of the material. MSP's operations are, in fact, virtually indistinguishable from a hazardous waste incinerator that slags its combustion ash.

Further evidence showing that MSP is an incinerator is that virtually all of its business activities are geared to waste destruction. All of its sales force solicit wastes to destroy them. All of its revenues come from its waste destruction operations.

EPA finds further that 40 C.F.R. § 266.20 does not apply to MSP's activities because that provision applies only to hazardous wastes that are being recycled, and MSP is engaging in incineration/disposal activities. However, EPA further finds that MSP has also not satisfied the terms of that provision.

EPA also finds as a matter of law that the hazardous waste-fired oxidizers cannot be industrial furnaces because they are not among the devices listed in the industrial furnace definition. This finding is in accord with the express language of the regulations defining industrial furnaces, and EPA has never interpreted those regulations in a way that would allow a hazardous waste-fired oxidizer to be considered as an aggregate kiln.

Finally, EPA exercises its omnibus authority under Section 3005 of RCRA to deny the application because of MSP's long history of non-compliance with environmental regulations, EPA believes that no set of permit conditions can be drafted that will ensure protection of human health and the environment. Environmental enforcement largely depends on the Agency's ability to trust regulated entities because EPA and states lack the resources to monitor every facility. MSP is not an entity that can be trusted. It has consistently violated air, water, and hazardous waste laws. It has misrepresented the nature of its operations in every significant environmental

permit application. It persists in doing so, the latest example being a false claim of being entitled to a regulatory exemption available to lightweight aggregate kilns in its BIF certification of compliance.

For these reasons, the permit application is denied.

APPENDIX I

(Slip Opinion)

BEFORE THE
ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C.

RCRA Appeal No. 94-12

In re: MARINE SHALE PROCESSORS, INC.

Docket No. 06900009

[Decided March 17, 1995]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

MARINE SHALE PROCESSORS, INC.

RCRA Appeal No. 94-12

FINAL DECISION AND ORDER

Decided March 17, 1995

Syllabus

By petition dated October 20, 1994, Marine Shale Processors, Inc. ("MSP") requested that the Environmental Appeals Board review the decision of Region VI denying MSP's application for a RCRA permit for MSP's facility in Amelia, Louisiana. MSP had sought a permit to operate as an industrial furnace under the Boilers and Industrial Furnace ("BIF") Rule. 40 C.F.R. Part 266 (Subpart H); 56 Fed. Reg. 7134 (February 21, 1991). By order dated December 7, 1994, the Board granted MSP's petition for review and scheduled oral argument. Oral argument was held on January 12, 1995.

MSP's facility consists of among other things, a rotary kiln, two hazardous waste-fired oxidizers, a "slag box," a baghouse, and an emissions stack. The facility receives and burns hazardous waste from a large variety of sources and, according to MSP, produces a useful product from these wastes, which MSP calls "aggregate." According to MSP, this "aggregate" is the result of a patented manufacturing process that uses thermal treatment to accomplish the recovery of materials or energy. In addition, MSP asserts that its "aggregate" constitutes a legitimate product which can be sold to interested parties for a variety of uses. MSP asserts that, as an aggregate kiln, it meets the definition of an industrial furnace at 40 C.F.R. § 260.10 and is therefore entitled to a BIF permit. Thus, although MSP has operated the facility since July 1985,

MSP claims that it was exempt from obtaining an incineration permit for its kiln until 1991 and promulgation of the BIF rule.

Prior to August 21, 1991, the date on which the BIF rule became effective, combustion facilities, such as aggregate kilns, that were engaged in legitimate recycling operations were exempt from federal RCRA regulations governing the incineration of hazardous waste for destruction set forth in 40 C.F.R. Part 264, Subpart O. MSP has asserted that, as an aggregate kiln it was not incinerating wastes for destruction but was an industrial furnace engaged in legitimate recycling, and thus exempt from Part 264. The pre-BIF regulations, however, did not specify which activities by so-called industrial furnaces constituted legitimate recycling rather than incineration for purposes of waste destruction. The Agency therefore developed certain criteria to determine whether a facility was burning hazardous waste for destruction, and was therefore subject to regulation as an incinerator under 40 C.F.R. Part 264 Subpart O, or was engaged in legitimate recycling and therefore exempt from the standards applicable to incinerators. These criteria are referred to by the Agency as the "sham recycling criteria." Among the factors the Agency considered relevant in determining whether a facility was a sham or a legitimate recycler were: 1) whether a hazardous waste was ineffective or only marginally effective for the claimed use; 2) whether a hazardous waste was used in excess of the amount necessary to make a product; 3) whether the material burned was as effective as the material it was replacing; 4) whether sufficient records were kept documenting recycling transactions; 5) whether materials were stored and handled in a manner consistent with their use as raw materials or commercial product substitutes; 6) whether wastes were solicited and accepted indiscriminately; and 7) whether the hazardous waste had little or no energy value. With promulgation of the BIF rule in 1991, however, all facilities burning hazardous waste, including ag-

gregate kilns engaged in legitimate recycling, are now subject to regulation.

Region VI denied MSP's BIF permit application on several grounds. First, utilizing the sham recycling criteria, the Region concluded that MSP's rotary kiln and associated equipment are not integral components of an aggregate manufacturing process. Thus, according to the Region, MSP is subject to regulation as an incincerator rather than as a BIF. The Region also considered whether the facility produced an effective commercial-grade aggregate useful to industries who generally purchase such products. The Region stated that in order to make this determination the material exiting MSP's facility was tested by experts retained by the Agency as well as the Louisiana Department of Transportation and Development ("La. DOTD") and compared to aggregate commonly accepted by the construction industry. The La. DOTD concluded that the material did not meet applicable requirements for use in road and bridge construction in the State of Louisiana. In addition, Agency experts concluded that MSP's material could not be considered "aggregate" from a civil engineering perspective. Second, the Region concluded that MSP's oxidizer units are themselves incinerators, and MSP was therefore required to obtain an incinerator permit even if MSP was otherwise engaged in a manufacturing process. Finally, the Region asserted that under the "omnibus" authority of RCRA § 3005(c)(3), MSP's prior history of noncompliance wtih various environmental statutes and regulations justified the permit denial.

MSP makes the following arguments challenging the Region's determination: 1) the BIF permit denial violated MSP's constitutional right to due process because the permit application was reviewed and decided upon by biased decisionmakers who had prejudged adjudicative factual and legal issues relating to the application; 2) under the separation of powers doctrine, the Board should defer to the rulings of the Federal District Court for the

Western District of Louisiana in a related enforcement action brought by the Agency and stay the current permit proceedings pending the final outcome of that action; 3) under the seventh amendment to the United States Constitution, the Board may not rule on factual issues delegated to the jury in the enforcement action; 4) the Board is collaterally estopped from redeciding issues previously decided by the district court; 5) the Agency's reliance on the sham recycling criteria was clearly erroneous and violates the Administrative Procedure Act; 6) the Region's determination that MSP is not a legitimate recycler was clearly erroneous and based upon an incomplete review of the administrative record; 7) the Region's conclusion that MSP's facility does not meet the definition of and industrial furnace is clearly erroneous and impermissibly disregards the jury's findings and the district court's rulings in the enforcement action; 8) MSP's aggregate is a legitimate product within the meaning of 40 C.F.R. § 266.20; and 9) the Region may not deny the permit application based on the Region's conclusions regarding MSP's prior regulatory history.

Held: The Board concludes that there is more than adequate evidence in the record to support the Region's conclusion that MSP's facility does not function as an "aggregate kiln" within the meaning of 40 C.F.R. § 260.10 and thus does not meet the definition of industrial furnace. In particular, analyses of the material produced by MSP indicate that it is not of sufficient quality and consistency to be considered commercial-grade aggregate that is useful to industries that regularly purchase that product. An analysis of MSP's material by experts retained by the Agency as well as the Louisiana Department of Transportation and Development support the conclusion that the material is not a commercially useful aggregate. Although MSP presented evidence to show that some portion of the more than 200 thousand tons of material it produces may be useful and marketable as fill material, and possesses some of the attributes of aggregate, it did not

present any evidence to show that its product has ever been used in any substantial quantities as aggregate by anyone in the construction industry. In such circumstances, the Board finds that the Region correctly concluded that MSP's facility is not an industrial furnace within the meaning of 40 C.F.R. § 260.10.

In addition, MSP has not presented the Board with any legal basis for rejecting the Region's determination. The Board concludes that it is not collaterally estopped by the jury's answers to interrogatories in the civil enforcement proceeding from concluding that MSP's facility is not an industrial furnace. In addition, the Board finds that neither the Seventh Amendment nor separation of powers principles preclude the Board from acting on MSP's permit application. Finally, after a careful review of the record the Board does not believe that MSP's allegations of bias warrant a reversal of the Region's permit denial.

The Region's denial of the BIF permit application is therefore affirmed and this matter is remanded so that the Region can issue a final permit denial.

Before Environmental Appeals Judges Nancy B. Firestone and Ronald L. McCallum.[1]

Opinion of the Board by Judge McCallum:

Before us is a petition for review of U.S. EPA Region VI's decision to deny a Part B application submitted by Marine Shale Processors, Inc. ("MSP") in April of 1992 for a permit under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, for MSP's facility located in Amelia, Louisiana. *See Petition for Marine Shale Processors, Inc. for Review of BIF Permit Denial* ("Petition"). MSP had sought a permit to operate as an industrial furnace under the Boilers and Industrial Furnace ("BIF") Rule. 40 C.F.R. § 270.66; 56 Fed.

[1] Environmental Appeals Judge Edward E. Reich did not participate in this decision.

Reg. 7134 (Feb. 21, 1991). Although the State of Louisiana has been authorized under section 3006 of RCRA, 42 U.S.C. § 6926, to administer certain aspects of the RCRA program in lieu of the federal program, MSP's permit application was handled by EPA in this case because Louisiana has not yet been authorized to implement the BIF rule. By order dated December 7, 1994, the Board granted MSP's petition for review and scheduled oral argument. Oral argument was held on January 12, 1995.

I. *BACKGROUND*

MSP's facility consists of, among other things, a rotary kiln, two hazardous waste-fired oxidizers (referred to by the parties as oxidizers number 1 and number 2, a "slag box," a baghouse, and an emissions stack. The facility receives and burns hazardous waste from a large variety of sources, and, according to MSP, produces a useful "aggregate" from these wastes for use as fill material and in asphaltic mixtures, among other things.

Waste materials are initially fed into the rotary kiln and burned at temperatures ranging from 1600 to 2500 degrees Fahrenheit. *Statement of Basis for Proposed Denial of Permit Application by Marine Shale Processors, Inc.* at 4 (January 31, 1994). After exiting the kiln, the metals concentration of the remaining ash material, referred to by MSP as "primary aggregate," is tested to determine whether it contains metal concentrations exceeding applicable land disposal restrictions.[2] *Id.* MSP frequently places ash material that fails to meet applicable land disposal treatment standards into the oxidizers where many of the materials melt and flow into the "slag box." *Id.* The molten material is then cooled by dropping the material into a water "quench," producing a black, glassy material referred to by MSP as "slagged aggregate." *Id.* MSP refers to this process as "slagging" or "vitrification." *Id.*

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[2] *See generally* 40 C.F.R. Part 268 (Land Disposal Restrictions).

Although MSP has operated the facility since July of 1985, it did not seek a RCRA operating permit for its combustion activities until after promulgation of the BIF rule in 1991. Prior to August 21, 1991, the date on which the BIF rule became effective, MSP contended that it was a legitimate recycler engaged in the production of "aggregate" and therefore exempt from RCRA's waste incineration regulations. 40 C.F.R. Part 264 Subpart O. More specifically, MSP contended, as it still contends, that it is an "aggregate kiln" engaged in legitimately recycling hazardous waste into aggregate, and thus it is an industrial furnace under 40 C.F.R. § 260.10 [8] and not an incinerator destroying hazardous wastes. We note that the pre-BIF regulations, however, did not specify which activities constituted legitimate recycling rather than incineration. The Agency therefore developed certain criteria to determine whether a facility was burning hazardous waste for destruction, and was therefore subject to regulation as an incinerator under 40 C.F.R. Part 264 Subpart O, or was an industrial furnace engaged in legitimate recycling and therefore exempt from the standards applicable to incinerators. These criteria are referred to by the Agency as the "sham recycling criteria." *See* 50 Fed. Reg. 638 (January 4, 1985); Memorandum from Lisa K. Friedman, Associate General Counsel, Solid Waste and Emergency Response Division, to Administrative Record for Marine Shale Permit Decision, dated August 8, 1994 (Responding to MSP on Issues Relating to Use of EPA's Sham Recycling Criteria), Administrative Record (AR), Exh. E-6. Among the factors the Agency considered relevant in determining whether a facility was a sham or a legitimate recycler were: 1) whether a hazardous waste was ineffective or only marginally effective for the claimed use; 2) whether a hazardous waste was used in excess of the amount necessary to make a product; 3) whether the material burned was as effective as the material it

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[8] *See infra* note 5.

was replacing; 4) whether sufficient records were kept documenting recycling transactions; 5) whether materials were stored and handled in a manner consistent with their use as raw materials or commercial product substitutes; (6) whether wastes were solicited and accepted indiscriminately, and 7) whether the hazardous waste had little or no energy value. With promulgation of the BIF rule in 1991, however, all combustion units listed in 40 C.F.R. § 260.10, including aggregate kilns engaged in legitimate recycling, are now subject to specific permit requirements. In fact, facilities falling within the definition of a BIF are subject to more stringent requirements than are those facilities regulated as incinerators. *See* 56 Fed. Reg. 7,188 (February 21, 1991).

In May of 1991, MSP submitted its Part A permit application for the purpose of obtaining interim status as a BIF. *See infra,* note 46 and accompanying text. In April of 1992, at the Region's request, MSP submitted a six-volume Part B application for a BIF permit to Region VI pursuant to 40 C.F.R. Part 266. *See id.* According to MSP, the so-called aggregate it produces is the result of a patented manufacturing process that uses thermal treatment to accomplish the recovery of materials or energy. In addition, MSP asserted that this aggregate constitutes a legitimate product which can then be sold to interested parties for a variety of uses.[4] MSP concludes

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[4] Pursuant to an order issued by the Louisiana Department of Environmental Quality (LDEQ), MSP has not sold any of its material to the general public since May 26, 1989. *See* Administrative Record (AR) Exh. A-25. Citing concerns over whether MSP's material met applicable land disposal treatment requirements at 40 C.F.R. Part 268, LDEQ forbad MSP from removing any of this material from MSP's premises. Pursuant to a court order dated August 2, 1991, issued by the United States District Court for the Western District of Louisiana. MSP has been permitted to sell its material only for use in the development of an industrial park in the vicinity of MSP's plant owned by Recycling Park, Inc. (RPI). RPI is a "sister corporation" of MSP's that owns 200 acres of property near the facility. *See Corrected Response of*

that its facility is an "aggregate kiln" and therefore meets the definition of industrial furnace at 40 C.F.R. § 260.10.[6] Thus, MSP asserts that it is entitled to a BIF permit.

United States Environmental Protection Agency to petition of Marine Shale Processors. ("Region's Response") at 3.

[6] The industrial furnace definition reads as follows:

Industrial furnace means any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy:

(1) Cement kilns

(2) Lime kilns

(3) Aggregate kilns

(4) Phosphate kilns

(4) Coke ovens

(6) Blast furnaces

(7) Smelting, melting and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machine[s], roasters, and foundry furnaces)

(8) Titanium dioxide chloride process oxidation reactors

(9) Methane reforming furnaces

(10) Pulping liquor recovery furnaces

(11) Combustion devices used in the recovery of sulfur values from spent sulfuric acid

(12) Halogen acid furnaces (HAFs) for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as-generated.

(13) Such other devices as the Administrator may, after notice and comment, add to this list on the basis of one or more of the following factors:

(i) The design and use of the device primarily to accomplish recovery of material products;

(ii) The use of the device to burn or reduce raw materials to make a material product;

[Continued]

A. *BIF Permit Denial*

On January 31, 1994, the Region proposed to deny MSP's BIF permit application on several grounds. *See Statement of Basis for Proposed Denial of Permit Application by Marine Shale Processors, Inc.* ("Proposed Denial"). The primary basis for the proposed denial was the Region's conclusion that "MSP does not meet the definition of an aggregate kiln and, therefore, does not meet the definition of industrial furnace as stated in 40 C.F.R. § 260.10." Proposed Denial at 1 (footnote omitted). According to the Region, MSP's facility functions not as an industrial furnace but as a commercial incinerator and therefore is subject to the incinerator rather than the BIF regulations. Proposed Denial at 10. The Region further stated that, pursuant to 40 C.F.R. § 260.10, the essential attribute of an industrial furnace "is to be an integral component of a manufacturing process." *Id.* Utilizing the sham recycling criteria discussed above, the Region concluded that, contrary to MSP's assertion, MSP does not operate an aggregate kiln because MSP's rotary kiln and associated equipment are not integral components of a manufacturing process.[6] The Region also concluded

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[5] [Continued]

(iii) The use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw materials as principal feedstocks;

(iv) The use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product;

(v) The use of the device in common industrial practice to produce a material product; and

(vi) Other factors, as appropriate.

40 C.F.R. § 260.10.

[6] Upon application of the sham recycling criteria, the Region concluded that: (1) MSP has burned, and continues to burn, large volumes of hazardous wastes that have no recycling value; (2) MSP's material is not useful by industries that use aggregate and is not a marketable aggregate product; (3) MSP is using hazardous waste in excess of what it would need if it were merely using the

that the output from MSP's facility does not qualify as a recycled material or meet the requirements for a recycled product at 40 C.F.R. § 266.20. Thus, according to the Region, the facility does not meet the definition of an "industrial furnace" at Section 260.10. *Id.* at 10-11.

The proposed denial was also based on the Region's belief that MSP's oxidizer units are themselves used to incinerate hazardous waste and cannot be classified as industrial furnaces under Section 260.10. Thus, according to the Region, "[e]ven if MSP's arguments that it is engaged in manufacturing a product are taken as true and the oxidizers are considered to be 'integral components of [a] manufacturing process,'" the facility was still required to obtain an incinerator permit. *Id.* at 27-28 (brackets in original). Finally, the Region asserted that under the "omnibus" authority of RCRA § 3005(c)(3), even if MSP were otherwise entitled to a BIF permit, the Region properly denied the permit application based on MSP's prior history of non-compliance with various federal and State environmental regulations. *Id.* at 28.

During the comment period on the Proposed Denial, MSP submitted a two-page letter charging that the Agency had applied "result-oriented" and "urged for" interpreta-

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hazardous waste to produce aggregate; (4) The hazardous waste used by MSP is not as effective for producing aggregate as the raw materials normally used to produce aggregate; (5) There is an enormous disparity between the revenues that MSP receives from accepting hazardous waste from generators and the insignificant revenues it receives from selling its aggregate; (6) MSP accepts hazardous wastes indiscriminately without regard for how those wastes might affect the quality of its output; (7) The hazardous constituents in the wastes used by MSP do not contribute any valuable qualities to MSP's output, suggesting that the hazardous constituents are merely being burned for destruction; (8) MSP does not keep adequate records documenting the disposition of its output; (9) There is a strong similarity between MSP's operating practices and those of a commercial hazardous waste incinerator; and (10) MSP cannot demonstrate a known market or disposition for its "aggregate." Denial at 9-36.

tions of the applicable regulations in an attempt to "purposely drive MSP out of business." *See* Letter from George Badge Eldredge, Vice President and General Counsel of MSP, to Allyn M. Davis, Director, Region VI Hazardous Waste Management Division, at 1 (June 30, 1994). The letter also stated that many of the grounds for the proposed denial "have already been obviated by the jury's findings and the judge's rulings" in a related enforcement proceeding in the Federal District Court for the Western District of Louisiana. *Id.* at 2. Along with this letter, MSP submitted eighteen boxes of documents which it stated "demonstrate that the company should be granted a BIF permit." *Id.* According to Region VI, this amounted to approximately 80,500 pages of documents. *See The Environmental Protection Agency's Expedited Motion to Deny Review*, at 6 (Nov. 4, 1994). MSP's letter did not specifically identify any issues raised by these documents, nor did it reference any specific issues raised in the Proposed Denial. The Region did, however, "in its discretion chose to interpret MSP's submissions and respond as best it could." *Id. See* Response to Comments, AR Exh. E-17.

The Region issued a final decision denying MSP's BIF permit application on September 15, 1994. *See Statement of Basis for Denial of Permit Application by Marine Shale Processors, Inc.* ("Denial"). In the Denial, the Region essentially adopted the rationale articulated in the Proposed Denial, i.e., MSP's facility is not an "aggregate kiln" and therefore does not meet the definition of "industrial furnace" at 40 C.F.R. § 260.10, the facility's output does not meet the definition of recycled materials or the requirements for a recycled product, the oxidizer units are themselves incinerators and are therefore subject to regulation as incinerators, and, under the Agency's omnibus authority, the permit was properly denied because of MSP's prior history of non-compliance with various environment regulations. Denial at 1.

In analyzing whether or not MSP's facility could be considered an aggregate kiln, one of the 12 devices specifically identified as industrial furnaces at Section 260.10, the Region considered, *inter alia*, whether the facility produced an effective commercial-grade aggregate useful to industries which generally purchase such products. *See* Denial at 13 ("The issue here is whether the hazardous wastes used by MSP produce an effective, usable 'aggregate' or whether the hazardous wastes produce ineffective or marginally effective 'aggregate.' "). The Region stated that the material exiting MSP's facility was tested by experts retained by the Agency as well as the Louisiana Department of Transportation and Development ("La. DOTD") and compared to other material commonly accepted by industry. *Id.* As discussed more fully below, the La. DOTD concluded that the material did not meet applicable requirements for use in road and bridge construction in the State of Louisiana. In addition, Agency experts concluded that MSP does not produce a marketable aggregate product. The Region relied on the fact that MSP never established a market for its material as a commercial-grade aggregate, despite the fact that MSP had produced over 200 thousand tons of this material and that between 1985 and 1989 MSP was free to sell the material to the construction industry. The Region concluded, based on these and other factors, that MSP's facility did not meet the definition of "industrial furnace" at 40 C.F.R. § 260.10. This appeal followed.

B. *District Court Proceedings*

In June of 1990, prior to promulgation of the BIF rules, the Agency initiated a civil enforcement proceeding in the United States District Court for the Western District of Louisiana alleging, among other things, that MSP's combustion of hazardous waste since it began operating in 1985 constituted incineration rather than legitimate recycling. Thus, according to the Agency, MSP was required under the regulations governing the incineration

of hazardous waste to obtain an incinerator permit before it began operating.

Southern Wood Piedmont Company (SWP) filed a complaint in intervention in the district court proceeding, alleging that SWP delivered certain materials (mostly soils contaminated with organic wood preserving substances such as creosote) to MSP and that MSP processed this material separately from material received from other sources. In Count 1 of its complaint, SWP sought a declaration that the material exiting MSP's kiln after burning SWP's waste (unmixed with any other waste) was a "product" within the meaning of 40 C.F.R. § 266.20(b)[7] and thus did not have to be disposed of as a "hazardous waste."

Following a trial on the merits, the jury was asked to respond to a total of thirteen interrogatories. The interrogatories that relate to the issues before us are as follows:

> 1. Was MSP entitled to a recycler exemption from the requirement of a permit as an operator of an incinerator of hazardous waste?
>
> 2. Were all of the hazardous wastes accepted by MSP beneficially used or reused or legitimately recycled?
>
> If your answer to question number 2 is "YES", skip question 2(a) and go on to Question No. 3.
>
> If your answer to question No. 2 in "NO", answer the following question No. 2(a).

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[7] Section 266.20(b) states, in part as follows:

> Products produced for the general public's use that are used in a manner that constitutes disposal [(applied or placed on land)] and that contain recyclable materials are not presently subject to regulation if the recyclable materials have undergone a chemical reaction in the course of processing the products so as to become inseparable by physical means and if such products meet the applicable treatment standards * * *.

2(a). Were all of he hazardous wastes accepted by MSP prior to August 21, 1991, beneficially used or reused or legitimately recycled?

3. Was the material produced by MSP from [SWP's] waste a "product" produced for the general public's use?

4. Did the waste material received by MSP from [SWP] undergo a chemical reaction in the course of processing the material so as to become inseparable by physical means?

5. Was the material produced by MSP from waste other than [SWP's] waste a "product" produced for the general public's use?

6. Did the waste material received by MSP from waste other than [SWP's] waste undergo a chemical reaction in the course of processing the material so as to become inseparable by physical means?

10. Is MSP's rotary kiln an aggregate kiln?

11. Are Oxidizers 1 and 2 aggregate kilns?

12. Is MSP's slag box an aggregate kiln?

13. Are the rotary kiln, oxidizers Nos. 1 and 2, and slag box part of a kiln system that produces aggregate?

The jury was unable to reach a decision on interrogatories 1-2 and 5-6. That is, the jury was unable to decide whether MSP was a "sham recycler" and was therefore required to obtain an incinerator permit before it began operating. In addition, the jury could not decide whether the material produced by MSP (other than from SWP's material) met the requirements of Section 266.20(b) (Recyclable material used in a manner constituting disposal) and thus was not subject to regulation as hazard-

ous waste. The parties have indicated that these issues will be retried in the district court.[8]

With regard to the material from SWP (interrogatories 3 and 4), the jury responded in the affirmative. That is, the jury concluded that all materials produced by MSP from wastes sent by SWP when unmixed with other wastes satisfied the requirements of Section 266.20(b), and thus need not be disposed of as a hazardous waste. In response, the District Court entered a final judgment giving effect to the jury's findings on this issue. *See Judgment and Reasons for Judgment* (Civ. Action No. 90-1240, W.D. La. June 15, 1994) (granting SWP's motion for entry of judgment pursuant to rule 54(b) of the Federal Rules of Civil Procedure).[9]

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[8] The district court also heard claims by the Agency alleging certain additional violations arising under the Clean Air Act, the Clean Water Act, and RCRA. By order dated August 30, 1994, the court assessed penalties against MSP for violations of each of these statutes. Specifically, for Clean Air Act violations (failure to obtain a Prevention of Significant Deterioration Permit and failure to obtain a permit for certain minor emission sources) the court assessed penalties of $3,500,000. For Clean Water Act violations (unpermitted discharges of non-contact cooling water) the court assessed a penalty of $3,000,000. Finally, for various RCRA violations (involving land disposal and storage requirements) the court assessed penalties of $1,500,000. The court noted that the $1,000,000 fine for storage violations was in addition to a $600,000 fine previously assessed for the same violations in an earlier criminal prosecution. *See United States v. Marine Shale Processors, Inc.*, Civ. Action No. 90-1240. Section "H". *Order and Reasons.* (August 30, 1994).

[9] Rule 54(b) states as follows:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence

On interrogatories 10 through 13, the jury made the following findings: MSP's rotary kiln is an aggregate kiln; MSP's oxidizers are not aggregate kilns; MSP's slag box is not an aggregate kiln; and the rotary kiln, oxidizers nos. 1 and 2, and the slag box are part of a kiln system producing aggregate. The court, however, did not enter a final judgment on these issues.

C. *Arguments on Appeal*

On October 20, 1994, MSP filed a petition for review with the Environmental Appeals Board. As stated previously, the Board granted MSP's petition on December 7, 1994, and held oral argument on January 12, 1995.[10] The Petition raises a total of nine arguments. These are as follows: 1) the BIF permit denial violated MSP's constitutional right to due process because the permit application was reviewed and decided upon by biased decisionmakers who had prejudged adjudicative factual and legal issues relating to the application; 2) under the separation of powers doctrine, the Board should defer to the rulings of the district court in the enforcement action and stay the current permit proceedings pending the outcome of

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of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

[10] Following public notice of the Board's grant of review pursuant to 40 C.F.R. § 124.19(c), the Board received amicus briefs from the Environmental Technology Council and Concerned Mothers. In addition, the Board has received approximately 600 letters from various individuals asking that the Board suspend the current permit proceedings pending the outcome of the district court action. The Board has also received a letter from the Atchafalaya Delta Society opposing any stay of the current permit appeals process.

that action; 3) under the Seventh Amendment to the United States Constitution, the Board may not rule on factual issues delegated to the jury in the enforcement action; 4) the board is collaterally estopped from redeciding issues previously decided by the district court; 5) the Region's use of the sham recycling criteria was clearly erroneous and violates the Administrative Procedure Act; 6) the Region's determination that MSP is not a legitimate recycler is clearly erroneous and based upon an incomplete review of the administrative record; 7) the Region's conclusion that MSP's facility does not meet the definition of an industrial furnace is clearly erroneous and impermissibly disregards the jury's findings and the district court's rulings in the enforcement action; 8) MSP's aggregate is a legitimate product within the meaning of 40 C.F.R. § 266.20; and 9) the Region may not deny the permit application based on the Region's conclusions regarding MSP's prior regulatory history.

For the following reasons, the Region's denial of MSP's BIF permit application is affirmed and this matter is remanded to Region VI so that the Region can issue a final permit denial.[11]

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[11] In a motion dated November 4, 1994, the Region argued that the Board should dismiss the majority of the issues raised in MSP's petition for review on the ground that these issues were not raised during the public comment period. *See The Environmental Protection Agency's Expedited Motion to Deny Review* ("Expedited Motion"). The Board, however, declined to rule on any portion of MSP's petition prior to receiving the Region's response. The Expedited Motion was therefore denied. *See Order on the Region's Expedited Motion to Deny Review* (November 15, 1994). In its response to MSP's petition, the Region again argues that the Board should deny review on the majority of the issues raised in the petition on the ground that MSP failed to preserve these issues for review. *See* Region's Response at 38.

We agree with the Region that MSP's written comments in response to the proposed permit denial do not appear to be of sufficient specificity to preserve many of the above-mentioned issues for review by the Board. *See* 40 C.F.R. §§ 124.13 (persons objecting to a draft permitting decision "must raise all reasonably ascertain-

II. *DISCUSSION*

The Board's role in these permit proceedings is defined by section 124.19(a). Under that section, the Board ordinarily will not review a RCRA permit decision unless it appears to be based on a clearly erroneous finding of fact or conclusion of law, or involves an important policy consideration or exercise of discretion that warrants review. *See* 45 Fed. Reg. 33412 (May 19, 1980). Once the Board has granted review, as it has in this case, it will overturn the Regional Administrator's permit decision only if it concludes that: (1) the Regional Administrator's permit decision is based on a clearly erroneous factual or legal conclusion; (2) for compelling policy reasons,

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able issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10.") and 124.19 (a petition for review must include a "demonstration that any issues being raised [on appeal] were raised during the public comment period * * *."). We note, however, that many of the issues in dispute were indeed raised by various individuals during the comment period either in writing or at the March 14, 1994 public hearing and, as the Board has previously stated, as long as an issue has been raised by someone during the comment period, that issue is preserved for review even of the petitioner is not the one who made the comment. *In re Patowmack Power Partners, L.P.*, PSD Appeal Nos. 93-13, 93-14, at 3 (EAB, Feb. 24, 1994) (an issue that is reasonably ascertainable during the comment period must be raised at that time by someone (not necessarily the petitioner) if it is to be preserved for review). In any case, given the importance of the issues involved and the fact that the Region (in responding to comments on the proposed permit denial) proceeded to address many of these issues, the Board has decided that, regardless of which issues were or were not raised during the comment period, the Board will examine the merits of MSP's petition. *See American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules if the ends of justice so require); *In re Generator Power Station Limited Partnership*, PSD Appeal Nos. 93-1 through 93-7 at 6 n.5 (EAB, Sept. 8, 1983) (excusing failure to comply with filing requirements of 40 C.F.R. § 124.19 given the nature of the deficiency and the importance of the issues involved).

the Regional Administrator should have reached a different result; or (3) the Regional Administrator abused his or her discretion. On review, the burden is on MSP to show that the Regional Administrator's decision should be overturned. For the reasons set forth below, we conclude that MSP has not carried its burden.

As discussed in greater detail *infra*, we arrive at this conclusion by first examining the threshold issue of whether MSP's rotary kiln meets the definition of industrial furnace under 40 C.F.R. § 260.10. To meet that definition MSP had to show that its facility is more than an aggregate kiln in name; as an existing facility it must also function as an aggregate kiln by producing an aggregate product that is commercially recognized as such. The best evidence of commercial recognition is actual sales of commercial-grade aggregate in the market for which it is made. This market includes the Louisiana Department of Transportation and Development ("La. DOTD"), which is responsible for approving aggregate for use in State highway and related construction projects in Louisiana (MSP's home State). Under La. DOTD requirements, *all* aggregates must be from an approved source and, in order to be approved, "each sample submitted" shall pass all appropriate tests. AR Exh. A-15. If MSP's material does not qualify as commercial-grade aggregate our inquiry is ended, because unless MSP's facility is an aggregate kiln within the meaning of § 260.10, MSP is not an industrial furnace and is not eligible for a BIF permit. The Region denied MSP's permit application in large measure based on evidence that MSP's kiln does not produce or sell any significant quantities of commercial-grade aggregate. Although MSP introduced into the record evidence to show that some of its product is similar to commercial-grade aggregate in some respects, it failed to identify any evidence to this Board showing that, despite many thousands of tons of production, any substantial quantity of its product has in fact been used as a commercial-grade aggregate. Therefore, following a thorough

review of the record, we agree with the Region's conclusion that MSP does not function as an aggregate kiln within the meaning of § 260.10. We therefore conclude, for that reason alone, that MSP's rotary kiln cannot qualify as an industrial furnace and that MSP is not entitled to a permit under the BIF rule. In such circumstances, MSP is required to obtain a permit from the State of Louisiana under the State-equivalent of the subpart O incinerator regulations.

In addition, as also discussed in greater detail *infra*, we reject MSP's process-oriented challenges to the Region's permit denial. These challenges include MSP's arguments as to why the Board is prevented from even reaching the merits of the industrial furnace issue by the doctrine of collateral estoppel, by constitutional separation of powers considerations, or by the Seventh Amendment to the Constitution. We conclude that the Board is not so prevented. Also included among the process-oriented challenges is MSP's contention that the decision-makers below prejudged the adjudicative facts at issue in this permit proceeding and thereby deprived MSP of its property without due process of law in violation of the U.S. Constitution. We conclude that MSP has not been denied its Constitutional due process rights.

A. *MSP's Status as an Industrial Furnace*

With promulgation of the BIF rule, a combustion device burning hazardous waste is subject to one of two possible regulatory regimes depending on how it is classified.[12] If it is classified as a boiler or an industrial furnace, it is subject to the BIF rule at subpart H of part 266; if

[12] We note that prior to promulgation of the BIF rule the regulations and preambles to those regulations made it very clear that BIFs engaged *in any* waste destruction activities would be required to obtain an incineration permit under Part 264 Subpart O. *See* 40 C.F.R. § 264.340 (1990).

it is classified as an incinerator, it is subject to the incinerator rules at subpart O of part 264. MSP does not claim that its facility meets the "boiler" definition, so its facility will be subject to the BIF rule only if it meets the definition of "industrial furnace."

The Agency defines the term "industrial furnace" as a combustion device that: (1) falls into one of several categories of combustion devices designated in the definition; (2) is an integral component of a manufacturing process; and (3) uses thermal treatment to accomplish recovery of materials or energy.[13] To date, the Agency has designated twelve categories of combustion devices in the industrial furnace definition: cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting and refining furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping liquor recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and halogen acid furnaces.

Both parties are in agreement that "only those devices specifically named in the regulations (*i.e.*, in the definition of industrial furnace contained in § 260.10) are considered to be industrial furnaces for purposes of the regulation." *See* 50 Fed. Reg. 627 (Jan. 4, 1985) (final rule promulgating industrial furnace definition). Thus, even if MSP's rotary kiln satisfies the second and third requirements listed above—that is, even if it is an integral component of a manufacturing process that uses thermal treatment to accomplish recovery of materials—it cannot meet the definition of industrial furnace unless it also falls into one of the twelve categories of devices designated in the definition.

MSP claims that its facility belongs to the aggregate kiln category. To qualify as an aggregate kiln MSP's

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[13] *See supra* note 5 (definition of industrial furnace).

facility must not only have a design that allows it to produce aggregate; it must also *function* as an aggregate kiln by actually producing aggregate, since a defining characteristic of an aggregate kiln is that it produces aggregate. A threshold inquiry in determining whether MSP's facility comes within the industrial furnace definition, therefore, is whether MSP's output constitutes aggregate for purposes of the regulation defining industrial furnace.

The resolution of this issue cannot hinge merely on MSP's belief that its output should be called aggregate. The Agency has expressly rejected the notion that the regulatory regime applicable to a facility should depend on the subjective purpose of the owner.[14] Rather, whether

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[14] *See* 48 Fed. Reg. 14,483 (April 4, 1983):

> Although the existing definition of incinerator focuses on the purpose for which a device is used, the Agency did not intend to classify facilities solely on the basis of purpose. Rather, we intended that incinerators be distinguishable from boilers in order that the class of facilities subject to the standards for incineration be identifiable. The purpose for which a device is operated was used to indicate whether the device is an incinerator or a boiler. This distinction, however, has proven difficult to implement because the reference to "purpose" in the regulation introduced an unintended element of subjectivity.
>
> We accordingly are proposing a revised definition of incinerator that avoids the use of purpose to identify incinerators —so that facilities will no longer be able to escape regulation by claiming to have a primary purpose of recovery. The regulations do this by focusing on the physical character of the unit and not on its claimed purpose.

See also 50 Fed. Reg. 49,164 (November 29, 1985).

> In addition, as noted above, the Agency is moving away from tests based on purpose because the purpose of burning normally is unrelated to its environmental effect. Indeed, the argument that these rules (as well as RCRA section 3004(q) should apply only where energy recovery is the principal purpose of burning would resurrect the discredited "primary purpose" test formerly used by EPA to distinguish recycling from incineration. As both the Agency and Congress have stated, this

MSP's output constitutes aggregate must be judged according to objective indicia. The language of the industrial furnace definition—particularly terms like "manufacturing process," "industrial process," and "product"—makes clear that appropriate indicia for making such a judgment must be drawn from a commercial context. Thus, to be an industrial furnace and exempt from the rules governing incinerators an existing combustion unit claiming status as an aggregate kiln must be producing and selling a commercially-usable aggregate product, recognized as such by those who buy, sell, or use aggregate in the ordinary course of their commercial dealings.

In its denial of MSP's BIF permit application, the Region looked to recognized experts to help determine whether MSP produces commercial-grade aggregate. These experts indicated that industries seeking to use aggregate material in civil engineering projects such as road and bridge construction must obtain material that conforms to certain specifications depending on how it is to be used. *See Summary of Studies and Technical Opinions of Dr. Dallas Little and Dr. W. Ronald Hudson With Regard to Output of Marine Shale Processors Incinerator Residue* ("Little & Hudson Report") AR Exh. A-14 at 3 ("all civil engineering projects have relatively tight specifications"); Louisiana Department of Transportation, Standard Specification for Roads and Bridges § 1003 (1982) AR Exh. A-15. The record shows, for example, that in Louisiana, MSP's home state, aggregate material must meet detailed specifications prior to use in road or other State construction projects and must pass all appropriate tests, including soundness and abrasion tests. *Id.* at Exh. A-15 (all aggregates shall be from an approved source and shall pass all tests specified in the appropriate sec-

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standard was largely irrelevant for evaluating environmental effects of burning, and proved exceedingly difficult to administer. See 48 FR 14483 (April 4, 1983); S. Rep. No. 284, 98th Cong., 1st Sess. at 36 (1983).

tion).[15] Based on the results of tests performed by EPA experts and others (such as the Louisiana Department of Transportation and Development ("La. DOTD")), the Region concluded that "MSP's material is not useful by industries that use aggregate and is not a marketable aggregate product." Denial at 14.

In support of this conclusion, the Region relied primarily on a report by the La. DOTD addressing the use of MSP's output for road construction and the Little & Hudson Report addressing the civil engineering quality of MSP's output and the potential use of this output for such things as road and bridge construction.[16] *See* Denial at 13-14. The Region also relied on Dr. Hudson's expert testimony during the civil enforcement proceeding regarding the potential usefulness of MSP's output as construction aggregate.[17] *Id.*

The record before this Board contained the following information. First, in 1989, the La. DOTD attempted to test MSP's material and concluded that: 1) it could not test MSP's so-called primary aggregate because it did not have the composition or particle size necessary to perform certain tests; and 2) MSP's so-called slagged aggregate did not pass soundness and abrasion tests required prior to the approval of aggregates for use in road construction. (AR Exh. A-15.). In fact, nothing in the record before this Board indicates the La. DOTD has ever approved

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[15] Louisiana also has detailed specification for aggregates used for such things as portland cement concrete, asphaltic concrete mixtures, and sand-shell mixtures. *See* AR Exh. A-15.

[16] Little & Hudson Report, AR Exh. A-14 at 1. The first page of the report states that it was "supported by the Texas Research and Development Foundation, and done in conjunction with Metcalf and Eddy and test results provided by Southwestern Laboratories."

[17] *See* Trial Transcript Vols. 9-10. Hereinafter references to the trial transcript will be cited as follows: Tr. Vol. — at p. —.

MSP's material for any uses commonly associated with aggregate in the State of Louisiana.[18]

Second, the Little & Hudson Report detailed a variety of problems with MSP's output that would make this output of questionable value for use in construction projects. For example, the report states that due to the variability of the materials entering MSP's combustion facility and the "relatively random way in which the stock piles are stored, sorted, moved, and restored, there is considerable variability in the properties of the material [exiting the facility]." Little & Hudson Report at 3. The report states that "[s]ince all civil engineering projects have relatively tight specifications which require close tolerances on the various properties of the material and since the physical behavior of any material depends upon it[s] physical characteristics to a large extent, this variability is a severe detriment." *Id.* At the enforcement proceeding, Dr. Hudson testified that testing results revealed considerable variability in both the gradation (size) of the material and the material's absorption. *See* Tr. Vol. 9 at pp. 58, 62. According to Dr. Hudson, if the samples tested were "delivered to a construction site each day, you would not be happy if you had this much variability on a day-to-day basis in the water absorption of the material you purchased. It would make your construction process very difficult." *Id.* at 62. Dr. Little further stated that "any material that has day-to-day variability in its engineering properties [such as MSP's output] will have trouble and limited use as a construction material." *Id.* at 69.

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[18] In this connection, it is clear that commercial-grade "aggregate" is recognized as a special product that can be tested and categorized for various purposes. We note that while MSP introduced testimony to suggest that MSP's material could have some possible uses as "aggregate," MSP has not established that MSP's material *by itself and without any further processing* could satisfy the La. DOTD requirements for use in State projects.

The Little & Hudson report further concluded that MSP's material would be unsuitable for the following uses: a) as base course or subbase material because the material does not meet La. DOTD gradation specifications (Little & Hudson Report at 8); b) as aggregate in portland cement concrete because the materials have not been approved by the La. DOTD, "are too fine for use as a coarse aggregate in concrete[,] * * * and do not meet gradation requirements for fine aggregate or sand." (*Id.* at 9); and c) as asphalt aggregate because of gradation variability and high moisture absorption in the "primary aggregate." *Id.* at 11. The study also found that the slagged material was unsuitable for use as an asphalt aggregate because it did not meet minimum specifications in abrasion tests.[19] *Id.* at 12. Dr. Hudson concluded that MSP's output is not an aggregate from an engineering perspective because it does not meet the necessary specifications required of aggregate generally used in the construction industry. Tr. Vol. 9 at 65. Although, Dr. Hudson did state that at least the "primary aggregate" could be used as general fill material, he indicated that "anything can be used as fill." *Id.* at 66. Dr. Hudson thus concluded that, in his expert opinion, neither MSP's "primary aggregate" nor its "slagged aggregate" could be considered "aggregate" from an engineering perspective. *Id.* at 65.

MSP has argued that the Region ignored clear evidence that the output from MSP's facility has a variety of potential uses including as general fill material, in brick material, asphalt, concrete, and tile. Petition at 193. MSP points out that several companies have already purchased MSP's material and have been completely satisfied with

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[19] In his testimony at the enforcement proceeding, Dr. Hudson stated that the results of abrasion testing indicated that MSP's output did not meet minimum requirements for asphalt concrete used in road paving. Tr. Vol. 9 at 65.

the material's performance. *Id.* at 189-191. In addition, several other individuals testified that, absent any restrictions, they would purchase MSP's material in the future. *Id.* at 191-92. MSP further contends that its assertions regarding the usefulness of MSP's output in construction-related activities are supported by various expert studies, but that the Region ignored these studies.

Although we recognize that MSP's experts testified on the *potential* for using MSP's material in asphalt, cement, or bricks, and that its material has some similarities to some commercial aggregate products,[20] we are struck

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[20] Among the record evidence cited in the petition for review in support of MSP's assertion that its facility produces commercial aggregate products is testimony of the following: a) Dr. Paul Queneau, a metallurgist who compared samples of slagged material generated by other facilities which produced and sold slag for commercial purposes with MSP's material and concluded that MSP's material has "similar" physical and chemical properties to other waste-derived products generated by these other facilities. Petition at 194; Tr. Vol. 35 at pp. 21-32; b) Dr. Serji Amirkhanian, a professor of civil engineering at Clemson University, who, in 1993, at MSP's request, conducted a study analyzing the potential for using MSP's material in asphalt and cement mixtures to determine if MSP's materials could be used for "parking lots, driveways, secondary roads, for basically private work," Tr. Vol. 32 at pp. 39-41; *See also* AR Exh. A-21, concluded that material containing 15% of MSP's "slag aggregate" and 10% "primary aggregate," when compared to control samples, "really produced pretty much the same results * * *." Tr. Vol. 32 at pp. 40-41. Dr. Amirkhanian also conducted tests to determine whether MSP's material would be useful in concrete, *Id.* at 43, and based on these tests, concluded that cement samples containing 15% primary material (combined with other presumably non-MSP aggregate sources), could be used for parking lots, driveways, secondary roads and sidewalks. *Id.* at 43-49; c) Richard E. Root, President of Chicago Testing Laboratory, an engineering company providing consulting services to the asphalt paving industry, AR Exh. A-20, conducted a laboratory analysis of MSP's material in 1991 to determine its usefulness in asphalt mixtures for road paving, Tr. Vol. 30 at p. 63, and concluded that MSP's material "could be used successfully in asphalt mixtures." *Id.* at 78; and d) V.E. Sendukas,

by the fact that nothing in the record indicates that the material has ever in fact been used commercially for any of these purposes despite the fact that the facility has been in operation since July 1985.[21] Further, we are also struck by the fact that MSP's experts were themselves equivocal in their recommendations regarding the poten-

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a professional engineer employed by the consulting firm of Woodward-Clyde, participated in a feasibility study of the beneficial uses MSP's material in February of 1987, *see* Tr. vol. 29 p. 24; AR Exh. A-17, and concluded that MSP's "primary aggregate" is suitable for use in cement stabilization and that, *when stabilized with cement*, the resulting material passes La. DOTD standards for soil cement, Tr. Vol. 39 at pp. 34-35, and as embankment foundation for road construction. *Id.* at 61. MSP also relies on the following reports: a) a report prepared in December of 1993, by Dr. Denis A. Brosnan, a professor of ceramic engineering and director of the Center for Engineering Ceramic Manufacturing at Clemson University, AR Exh. A-18, in which Dr. Brosnan described MSP's "primary aggregate" as being fully analogous to "calcined clay aggregates" useful for such things as "fill in insulating products, for production of concrete block, and for other general uses of aggregates including construction, fill, and paving." *Id.* at 4. The slagged material was classified as "glass ceramic" that is "fully analogous to other glass ceramics including 'corning ware' (TM) which are well known in commerce." *Id.* at 5. According to Dr. Brosnan, MSP's material could be useful in both the brick making process and in the production of structural tiles. Petition at 198; AR Exh. A-18 at 25-26; and b) a report prepared at MSP's request by Barry L. Moore, a civil engineer working in the material testing field. Mr. Moore reviewed the studies prepared by experts relied on by the government in the civil enforcement proceeding and prepared a summary of his opinions regarding the usefulness of MSP's material. *See* AR Exh. A-24. Contrary to the view of the government's experts, Mr. Moore found that MSP's material was suitable for a variety of applications such as: "pipe backfill," the development of base or surface coarse when blended with other aggregate materials, asphalt, and as fine aggregate in Portland cement concrete. *Id.* at 1; Petition at 199.

[21] We acknowledge that MSP has been prevented from selling its material since 1989. However, this still leaves a four-year period within which MSP's material was not sold as commercial-grade aggregate but used primarily as general fill.

tial value of MSP's output. For example, Mr. Sendukas testified that he would not use MSP's material in asphalt mixtures nor did he recommend it for use in concrete mixtures. Tr. Vol. 30 at pp. 7-8. In fact, the only uses for which he would unequivocally recommend MSP's material is as general fill or for soil cement. *Id.* at 9. Mr. Sendukas further stated that the results of a 1988 slag characterization study indicated that MSP's slagged material had "limited potential as a construction material since it is extremely brittle and can be easily crushed by moderate pressure or impact." *Id.* at 28.[22] In addition, in a February 24, 1987 letter from Mr. Sendukas to Larry Johnson, MSP's Environmental Manager (AR Exh. A-19 (Plaintiff's exh. 7 to Jan. 28, 1993, deposition of V. E. Sendukas)), Sendukas stated that MSP's "aggregate samples" were tested and compared to La. DOTD specifications for seven classes of aggregates used in highway construction. The results of this comparison indicated that MSP's material "meets *only* the gradation requirements for sand used in Sand-Shell mixtures * * *." (Emphasis in original). The letter also states that the material was evaluated to determine if, subsequent to further processing, the material might have other uses. The letter states that the material "does not meet any DOTD specifications until it has been screened over the No. 80 sieve; at that point it barely meets the requirements for concrete sand. It should be considered, however, that processing through a No. 80 sieve will remove approximately 50 percent of the original material for which we have not determined any possible use." *Id.* at 2. The letter concludes that the most promising use for the material "will be as sand in DOTD Sand-Shell mixtures or as a 'fill' material." *Id.*

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[22] According to Mr. Sendukas, the 1988 study indicted that if MSP were to air cool its slagged material, the material would have better possibilities for use as a construction material. Tr. Vol. 30 at p. 28. MSP, however, never adopted the suggestion. *Id.* at p. 30.

In addition, during his deposition, Mr. Sendukas expressed his full agreement with the conclusions of a study done by the Petrographic Laboratory of the United States Bureau of Reclamation (the "Bureau"). AR Exh. A-19 (January 28, 1993 deposition of V. E. Sendukas at 466-67). In a memorandum dated October 5, 1988, reporting the results a petrographic examination of MSP's material designed to determine the suitability of the material for use in aggregate concrete, the Bureau, using applicable standards adopted by the American Society for Testing and Materials "with emphasis on the uniformity and homogeneity of the material," concluded as follows:

> Visual observation, petrographic particle count, and physical properties tests including gradation, absorption, and average specific gravity indicate the product produced by burning organic and inorganic wastes are not uniform and homogeneous in particle type, size distribution, and physical quality.
>
> Petrographic examination and physical quality evaluation tests indicate [that the sampled materials] are of poor physical quality and would be unsuitable for use in Reclamation concrete.

AR Exh. A-19 (Plaintiff's Exhibit 10 to January 28, 1993, deposition of V. E. Sendukas), at 7.

Finally, we find it significant that the authority charged with approving aggregate sources in the State of Louisiana has not approved MSP's facility as an "aggregate source." As stated above, any aggregate used in Louisiana State highway and related construction projects must come from an approved source and each aggregate sample must pass all appropriate tests. *See* AR Exh. A-15. The record indicates, however, that the only time MSP's material was tested to determine whether it met minimum requirements for aggregate under La. DOTD specifications, the material did not meet applicable specifications. AR Exh. A-15. MSP does not dispute this, nor does it assert that

the La. DOTD has ever officially approved MSP's material for any use in the State of Louisiana.[23]

Indeed, the evidence regarding the actual use of MSP's material indicates that it has been purchased primarily for use as general fill material. *See* Petition at 187-189. While we recognize that general fill material can certainly serve an engineering purpose in certain types of construction activities,[24] we agree with the Region that material suitable for use as a general fill material does not by that fact alone meet the requirements for "aggregate" as contemplated by Section 260.10.[25] *See* Denial at 16-17.

Thus, despite the fact that MSP presented testimony tending to support its assertion that the material it produces "could" have a variety of potential uses, viewing the record in its entirety, we do not believe that the Region committed any error in concluding that MSP's facility does not function to produce a commercial-grade aggregate and thus cannot be classified as an "aggregate kiln" as contemplated by 40 C.F.R. § 260.10. In our view, for a so-called "aggregate kiln" that claims to have been in the "aggregate manufacturing" business since July of 1985,[26] MSP should have easily been able to produce convincing and unequivocal evidence of actual commer-

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[23] In fact, one of MSP's expert witnesses (Mr. Sendukas) confirmed that neither MSP's so-called primary aggregate nor its so-called slagged aggregate has ever been included on the list of qualified products maintained by the La. DOTD. *See* Tr. Vol. 30 at pp. 48-49.

[24] As MSP states in its petition, Dr. Hudson testified at the civil enforcement proceeding that fill material can in certain instances serve an engineering purpose, such as for raising the level of a site to prevent flooding. Tr. Vol. 10 pp. 9-10.

[25] *See* 56 Fed. Reg. 7,159 (Feb. 21, 1991) ("The Agency has long been skeptical of claims that hazardous wastes are 'recycled' when they substitute for very commonly available and economically marginal types of raw materials.").

[26] See *supra* note 21.

cial uses and sales of its material as commercial-grade aggregate, rather than having to rely on testimony regarding potential uses of its material or on laboratory comparisons of its material with that of others. Yet, despite its longevity and the fact that MSP has produced over 285,000 tons of material,[27] MSP was not able to counter the Region's contention that MSP has never established the existence of a market for its so-called aggregate by showing that it has regularly sold its aggregate for use in industries typically utilizing commercial-grade aggregate, such as, industries engaged in highway or building construction or cement manufacturing.[28] As noted, for the most part MSP could only produce witnesses to say they purchased the material for general fill.[29] In such circumstances, we agree with the Region's finding and conclusion that MSP's facility is not an aggregate kiln. We therefore conclude that the Region was correct when it determined that MSP does not operate an aggregate kiln[30] within

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[27] Region's Response at 15.

[28] *See* Denial at 31.

[29] As the Region has pointed out, the vast majority of the material produced by MSP has been used as fill material either on MSP's property to raise the grade of several acres above the 100-year flood plain (using approximately 147,000 tons of material) or has been sold to Recycling Park Inc., a sister corporation owning approximately 200 acres of property near the facility, for the development of an industrial park (using approximately 174,000 tons of material). Region's Response at 15-16.

[30] This is our first occasion to interpret the meaning of aggregate kiln. *See Beazner East, Inc. v. EPA*, 963 F.2d 605, 610 ("It is of little consequence that EPA's interpretation is new. Indeed, even if the EPA's interpretation * * * was developed for the first time in an agency adjudication, we would give the agency no less deference than if it had promulgated an interpretive rule."). In arriving at the conclusion that MSP's facility is not an aggregate kiln, we do not rely on the "sham recycling criteria" but on the language of Section 260.10 itself. Thus, we do not address MSP's contentions regarding application of the sham recycling criteria in this proceeding.

the meaning of Section 260.10, and is not, therefore, an industrial furnace.[31] For the reasons stated above, we affirm the Region's permit denial. [32]

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[31] In this connection, the fact that the material produced by MSP may well be a "product" within the meaning of 40 C.F.R. § 266.20, is not dispositive of the question of whether MSP's product is "aggregate." Here, there is more than sufficient evidence from which the Region could correctly conclude that MSP's product is not "aggregate."

[32] As an additional basis for denying MSP's permit application, the Region concluded that MSP's rotary kiln is not an integral component of a manufacturing process. The Region's conclusion is based on its determination that MSP burns hazardous waste at the facility primarily for the purpose of destruction, rather than for legitimate recycling purposes. In upholding the Region's denial of MSP's permit application, we do not rule on this conclusion. While we need not definitively decide the issue now, we note that we have serious doubts as to whether after promulgation of the BIF rule the purpose for which MSP is burning hazardous waste at the facility is relevant in the determination of whether MSP's facility meets the industrial furnace definition. Our reading of the language and history of the industrial furnace definition and the BIF applicability provision at section 266.100(a) suggests that a BIF may be engaged in multiple enterprises, including burning wastes for destruction and thus, the purpose for which hazardous waste is burned at the facility has little or no bearing on whether the facility meets the industrial furnace definition. Nor is the purpose relevant by reason of the fact that MSP claims to be using hazardous wastes as ingredients in its process.

The Region's permit denial was also based on the belief that MSP's oxidizers are themselves incinerators. Thus, according to the Region, even if MSP were indeed engaged in a manufacturing process and the oxidizers were considered to be integral components of that process, the facility would still require an incinerator permit. *See* Proposed Denial at 27-28; Denial at 1. However, as today's decision affirms the Region's permit denial on the ground that MSP's facility does not produce aggregate as contemplated by 40 C.F.R. § 260.10, and therefore does not meet the definition of an industrial furnace, we do not decide the status of MSP's oxidizers.

B. *Collateral Estoppel, Separation of Powers, and the Seventh Amendment*

MSP argues that the Board is prevented from reaching the issue of whether MSP's facility is an industrial furnace by the doctrine of collateral estoppel, by constitutional separation of powers considerations, and by the seventh amendment to the United States Constitution. For the reasons set forth below, these arguments are rejected.

1. *Collateral Estoppel*

In late May 1994, approximately four months *after* the Region had tentatively determined that MSP's facility did not meet the definition of an aggregate kiln,[83] a trial took place in the RCRA enforcement action and the case was submitted to the jury for its verdicts on several interrogatories posed to it by the court. The jury, however, was unable to arrive at a unanimous decision on all of the interrogatories, and was discharged from further service on the case on May 24, 1994.[84] As a direct consequence of the jury's indecisiveness, MSP moved for, and was granted, a mistrial on the undecided interrogatories. Tr. Vol. 59, at 12-13, 24 (May 24, 1994). Moreover, because of the incompleteness of the jury's verdicts, the court was unable to enter a judgment on any of the claims against MSP (although the verdicts were sufficient for the court to enter a judgment on Southern Wood Piedmont's (SWP's) claim, which concerned the regulatory status of certain materials that SWP had sent to MSP). Thus, at the end of the current phase of the district court RCRA enforcement proceeding as we know it, the case is subject to a retrial (except for the SWP matters).

The record before us does not disclose what effect, if any, the court intends to give on retrial to the interroga-

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[83] Proposed Denial at 1 (January 31, 1994).

[84] Tr. Vol. 59 at p. 24 (May 24, 1994).

tories for which the jury was able to provide answers.[35] For example, the jury affirmatively found that MSP's "rotary kiln was an aggregate kiln" (Interrogatory 10), and the "rotary kiln, Oxidizers Nos. 1 and 2, and slag box [are] part of a kiln system that produces aggregate" (Interrogatory 13).[36] Based on these answers, MSP strenuously argues that the Region was precluded, under the doctrine of collateral estoppel, from having decided in its September 15, 1994 final permit decision that the facility is not an aggregate kiln. Petition at 47-53. In response, the Region argues with equal conviction that the jury's answers are not entitled to preclusive effect, since the requirements of collateral estoppel are not satisfied in this instance.[37] Region's Response at 83-110. As discussed below, we believe that the law in the Fifth Circuit, which is controlling for purposes of analyzing the alleged preclusive effects of the jury's answers, is on the side of the Region.

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[35] MSP refers to the jury's answers as a "dispositive jury verdict." Petition at 51, n.12. The only matters originating in the jury that are appropriately characterized as a "dispositive jury verdict" are the jury's answers to Interrogatories 3 and 4, which form the basis for the court's entry of a judgment respecting the regulatory status of material produced by MSP from SWP's materials. As such, that verdict is not dispositive of the aggregate kiln status of MSP's facility.

[36] The jury determined however that neither oxidizers nos. 1 and 2 nor the slag box were aggregate kilns (Interrogatories 11 and 12).

[37] The Region's position on appeal is consistent with its determination in the final permit denial decision that the jury's answers did not preclude it from finding that MSP's facility was not an "aggregate kiln" for purposes of 40 C.F.R. § 260.10 (defining "industrial furnace"). *See* Denial at 1 ("EPA has determined that it will deny the permit application because MSP does not meet the definition of "aggregate kiln * * *."); Denial at 2 ("the Agency does not regard the inconclusive trial as in any way foreclosing its ability to reach a final determination on the permit application or obviate the need to do so.").

There are three elements to collateral estoppel: (1) the controverted issues must be identical in both the prior and subsequent actions; (2) the issue must have been actually litigated in the prior action; and (3) the resolution of the issue in the prior action must have been a necessary part of the judgment in the earlier action. *Recoveredge L.P. v. Pentecost*, 1995 U.S. App. LEXIS 3019 at 15 (5th Cir., Feb. 17, 1995); *Hughes v. Santa Fe Intern. Corp.*, 847 F.2d 239, 240 (5th Cir. 1988). For purposes of this decision, we assume that the first two elements have been satisfied.[38] As to the third element, it reflects in part the finality of an issue's resolution. In other words, an issue that has been resolved and incorporated into a final judgment has the requisite finality. The focal point of our analysis therefore centers on the finality of the jury's answers to Interrogatories 10 and 13, which declare that the MSP facility is an aggregate kiln, in direct contradiction to the Region's tentative determination of January 31, 1994 (which the Region later reaffirmed in its final decision of September 15, 1994). As discussed below, we conclude that the requisite degree of finality is missing from the jury's answers to these interrogatries.

In *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265 (5th Cir. 1986), the court clearly affirmed that in the Fifth Circuit collateral estoppel is only applicable when a final judgment is rendered.[39] The court held that

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[38] In this connection, we do not necessarily agree that the issues are, in fact, identical. Whether MSP's combustion facility is an industrial furnace within the meaning of Section 260.10 requires the application of law to facts, and we do not read the jury's answers to the interrogatories as necessarily sufficient to answer the legal issue.

[39] In *Avondale*, the court held that since a partial, interlocutory summary judgment is not a final judgment, it does not have any res judicata or collateral estoppel effect. The prior action was a personal injury action involving a shipfitter and a ship that was under construction in a shipyard. The partial summary judgment addressed the issue of the ship's ownership, and held that the

a partial, interlocutory summary judgment "was not a final judgment for purposes of either true res judicata or collateral estoppel," explaining as follows:

> As we said in *International Union of Operating Engineers v. Sullivan Transfer, Inc.*, 650 F.2d 669, 676 (5th Cir. 1981), "[t]he requirement of finality applies just as strongly to collateral estoppel as it does to res judicata." See also, e.g., *White v. World Finance of Meridian, Inc.*, 653 F.2d 147, 149-52 (5th Cir. 1981) (reciting "final judgment" requirement for both claim and issue preclusion). This partial summary judgment order did not even determine Avondale's liability—there being no determination either of fault on its part or of causation—much less King's damages, and hence was interlocutory and not appealable. Cf. Fed.R.Civ.P. 56(c) (summary judgment on liability alone "interlocutory in character").

786 F.2d at 1269 (footnote omitted) (brackets in original).

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shipyard owner, Avondale, was the owner *pro hoc vice* of the vessel in question. The personal injury action was eventually settled, and the court signed a final judgment approving the settlement with the injured shipfitter but without making any reference to the holding in the partial summary judgment.

A subsequent action in another court was brought by Avondale against Avondale's insurer and the employer of the injured shipfitter, in an effort to collect on an insurance policy and to be indemnified by the employer under the terms of its contract with Avondale. Avondale asserted that the earlier partial summary judgment, holding that it was the owner *pro hoc vice* of the vessel, was decided incorrectly, and therefore it should not be barred from recovering insurance by reason of a "watercraft exclusion" in the insurance policy. Avondale made similar contentions regarding the indemnity manner. The district court ruled against Avondale on that point, but on appeal, the Fifth Circuit agreed with the shipyard owner and held that Avondale was not collaterally estopped from relitigating the ownership question by reason of the earlier partial summary judgment.

Importantly, the court in its ruling specifically acknowledged that there are some authorities which hold that less than complete finality may nevertheless suffice for purposes of issue preclusion, or collateral estoppel. It noted, however, that the most prominent of these cases involved instances where the issues were already resolved on appeal before the final judgment in the first action. 786 F.2d at 1270. It expressly declined to apply the doctrine of collateral estoppel to situations where appellate review had not taken place. *Id.* at 1270-71. The court also expressly disavowed the position espoused in the Restatement (Second) Judgments, § 13, which adopts the view that final judgments for purposes of issue preclusion include a prior adjudication in another action that is "sufficiently firm" to be accorded "conclusive effect."[40] It noted that Moore's Federal Practice treatise takes the position that the Restatement approach presents serious problems. Accordingly, the court concluded that it would not depart from its previously stated rule that "an order granting partial summary judgment 'has no * * * collateral estoppel effect.'" 786 F.2d at 1272 (citation omitted).[41]

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[40] Section 13 of the Restatement (Second) Judgments provides as follows:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

[41] The Court of Appeals for the Fifth Circuit may have recently ignored its own carefully considered opinion on this point. In *Recoveredge L.P. v. Pentecost, supra,* the court appears to rely on the Restatement view regarding conclusiveness, *id. at 31,* despite the explicit rejection of that view in *Avondale Shipyards, Inc.* Specifically, the court suggests parenthetically that a "jury verdict rendered before entry of final judgment is conclusive for purposes of issue preclusion." *Id.* (parenthetical reference to comment "g, illus. 3" of the Restatement. § 13). The fact that it made this comment without mentioning the scrutiny given to the Restatement

Because the issues decided by the jury in the MSP case have not been incorporated into a final judgment, or partial final judgment,[42] we find that the jury's answers to the aggregate kiln interrogatories lack the requisite finality to be accorded preclusive effect in this permit proceeding. We arrive at this result based on our understanding of the law in the Fifth Circuit. *See, Avondale Shipyard, Inc., supra.* In addition, we base it on the following additional considerations, which establish, individually and collectively, that the jury's answers are not sufficiently firm to be accorded preclusive effect. First, we don't know what effect the district court intends to give to the jury's answers on retrial, e.g., the extent and manner to which they will be integrated into the proceedings on retrial. The district court expressed uncertainty over the relevance of the jury's answers to Interrogatories 10 and 13 to any final judgment that might be rendered in the continuing enforcement action, noting that the answers "*may be of no consequence*" because "[t]he only real issue concerning

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in *Avondale Shipyards, Inc.*, suggests that the court may have overlooked the *Avondale* precedent (even though *Avondale* appears in a string cite elsewhere in the court's opinion, but for an unrelated matter). In any event, because there are untold circumstances that might result in modification or even outright rejection of a jury verdict prior to entry of final judgment, we think a more accurate rendition of the point the court was intending to make in *Recoveredge* is that a jury verdict rendered before entry of final judgment "may be" (rather than "is") conclusive for purposes of issue preclusion. Even under *Recoveredge,* the jury's answers to Interrogatories 10 and 13 still would not be given preclusive effect, since, as explained elsewhere in the text, they are not sufficiently firm to be given that effect.

[42] Under Rule 54(b) of the Federal Rules of Civil Procedure a judge may enter a judgment on less than all of the claims pending before the court if he or she finds that there is no just reason to delay the case further and specifically directs the clerk to enter judgment on the claim(s) in question. Absent compliance with those requirements, any such ruling on less than all the claims is subject to revision at any time. The text of the rule appears in footnote 9 above.

interim BIF status may be whether Marine Shale was a recycler before the BIF regulation went into effect." Order and Reasons: Motions for Judgment under Rule 54(b), at 6, n.1 (Civ. Action No. 90-1240, W.D. La. June 21, 1994) (emphasis added). Second, because the jury's answers to Interrogatories 10 and 13 have not been incorporated into a judgment having finality, the issues decided by the jury are subject to retrial before another jury, pursuant to the court's plenary authority under Rule 54(b) to revise any order or form of decision (which encompasses jury verdicts) not certified final in accordance with the rule. Fed. R. Civ. P., 54(b); *see Thompson v. Trent Maritime Company, Ltd.*, 343 F.2d 200, 203 (3rd Cir. 1965) ("[I]t is submitted that, under the language of Rule 54(b), wherein it refers to 'any order or other form of decision, however designated,' is inclusive of jury verdicts, as well as court orders."). Third, the jury's answers are also subject to revision under Rule 49 if they are in any way inconsistent with the answers to any other interrogatories on retrial, or with any general verdict. Fed. R. Civ. P., 49. Fourth, the jury's answers are presumably subject to a motion notwithstanding the verdict at end of the new trial. *See* Fed. R. Civ. P., 50. Fifth, the jury's answers have not been subject to appellate review, which could only take place after the retrial. Sixth, and last, since the jury did not answer the interrogatories until after the Region had already made a tentative determination to the contrary on the aggregate kiln issue, there is ample basis for arguing that the Region's final decision, which relates back to the earlier tentative determination, is actually prior in time to the jury's answers. In that event, the jury's answers lack the necessary temporal quality of being antecedent to the Region's determination for preclusion to take effect.

As a separate matter, MSP also contends that, in addition to the jury's answers, various rulings of the district court should be accorded preclusive effect and thereby preclude the Region from determining that MSP is not

an aggregate kiln, or industrial furnace. Petition at 47-53. This contention is also subject to, and fails, the finality test of *Avondale Shipyards, Inc.* There simply has been no ruling by the court that constitutes a final judgment precluding the Region from determining that MSP's facility is not an industrial furnace. The district court's only ruling under RCRA, of which we are aware, that has attained the requisite finality (i.e., reduced to final judgment under Rule 54(b)) is the ruling that concerns the regulatory status of materials produced by MSP from Southern Wood Piedmont (SWP) materials. *See Judgment* and *Reasons for Judgment* (Civ. Action No. 90-1240, W.D. La. June 15, 1994). That ruling was made pursuant to Rule 54(b),and thus may be regarded as final for purposes of issue preclusion. However, the conclusion in that ruling that such materials are not subject to regulation as hazardous waste does not in any way compel the conclusion that MSP'S facility is an aggregate kiln or an incinerator. The ruling was based on the jury's answers to Interrogatories 3 and 4, which do not reach the issue of MSP's status as an aggregate kiln. Therefore, contrary to MSP's contentions, that ruling does not preclude the Agency from denying MSP a permit under 40 C.F.R. Part 266 on the grounds that the facility is not an aggregate kiln.

Accordingly, for the reasons stated above, we conclude that collateral estoppel is not a bar to the Region's denying MSP's permit application on grounds that the MSP facility is not an aggregate kiln, and hence, not an industrial furnace.

2. *Separation of Powers Doctrine*

MSP contends that EPA is violating the separation of powers doctrine of the Constitution by continuing the permit proceeding while the enforcement case is pending before an Article III court. Petition at 38-43. To correct this situation, MSP argues that: (1) EPA must defer to

various determinations of fact and law made in the district court proceeding;[43] and (2) EPA must stay its hand in this matter pending the outcome of the district court proceeding. The basis for this latter contention is not entirely clear, for MSP neither explains it clearly nor cites any case law directly analogous to the instant proceeding.[44]

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[43] For all practical purposes, this contention is addressed separately, above, under the collateral estoppel discussion.

[44] MSP appears to rely principally upon *Town of Deerfield, N.Y. v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993), in which the court held that "[a] *judgment* entered by an Article III court having jurisdiction to enter that *judgment* is not subject to review by a different branch of the government." (Emphasis added.) Yet, MSP points to no judgment of the district court that the Agency is allegedly ignoring or implicitly overturning. MSP also relies heavily upon the dissenting opinion in *Hurst v. CFTC*, 591 F.2d 1234 (7th Cir.), *cert. den.*, 442 U.S. 921 (1979). There the majority rejected an attempt to enjoin an administrative enforcement action, which the CFTC had commenced in court "based on the same violations of law involved in the administrative proceedings, but seeking different relief." *Hurst*, 591 F.2d at 1235. MSP's reliance on this case is unavailing, for it avoids the holding in the case and relies exclusively upon the dissent, which is obviously not the law of the case. Another case upon which MSP places considerable reliance is *California v. FPC*, 369 U.S. 482 (1962). But that case is distinguishable, in part, at least, on the grounds that the executive branch of the government was itself divided over the Federal Power Commission's exercise of administrative jurisdiction. The Attorney General was in court prosecuting a civil antitrust action regarding the acquisition of one corporation's stock by another, yet the FPC, an independent agency, was approving the merger of the two corporations. The Attorney General opposed the FPC's exercise of administrative jurisdiction to approve the merger, for that approval was obviously inconsistent with the position being taken in court by the Department of Justice. Under the circumstances, it is not surprising that the Court held: "We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of the that transaction under the antitrust laws? We think not. We think the Commission in those circumstances should await the decision of the courts." 369 U.S. at 487. In the instant proceeding there is no such conflict between

See id. We will assume for the sake of discussion, however, that MSP is contending that the Region has in some way first submitted a particular matter for decision to the court but has subsequently initiated a separate administrative proceeding to resolve the same matter. If that were the scenario presented to us we would agree that an issue would arise as to which forum should properly exercise jurisdiction in those circumstances. But that is demonstrably not the situation we face.

Here, we are confronted with one proceeding that was initiated by the Region and the other by MSP. EPA Region 6 initiated the first proceeding by filing a civil lawsuit in federal district court in June of 1990, alleging *inter alia* that MSP's combustion of hazardous waste since it began operating in 1985 constituted incineration rather than legitimate recycling. Thus, according to the Region, MSP was required to obtain an incineration permit from the Louisiana permitting authorities (because authority to administer the incinerator permit program had previously been delegated to the State)[45] under State regulations governing the incineration of hazardous waste. Since MSP had not obtained a State incineration permit, the government's lawsuit alleged violations of the RCRA permitting requirements. Importantly, at the time of filing the lawsuit, the BIF rule requirement was not even in existence. Although the Agency had earlier proposed rules governing the permitting of BIFs, the rules were not adopted in final form until their promulgation in the *Federal Register* on February 21, 1991. 56 Fed. Reg. 7134, *et seq.* The second proceeding was initiated by MSP, solely of its own volition, in May 1991, when it

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the Department of Justice and EPA, therefore, for that reason alone, *California v. FPC* is not controlling.

[45] The State of Louisiana received interim authorization to administer its hazardous waste program in lieu of the federal program on January 24, 1984. Final authorization was effective on February 7, 1985. *See* 50 Fed. Reg. 3,348 (Jan. 24, 1985).

filed a Part A application for a BIF permit in order to obtain interim status under the BIF rule. In addition, in April of 1992, in response to Region VI's directive to file Part B of the application, MSP submitted a six-volume application for a BIF permit.[46] By submitting Part A of the application, MSP took the first formal step in requesting the Region to issue it a permit under the BIF rules; also, by submitting a six-volume application in response to the Region's subsequent request that it file Part B of the application, MSP thereby further confirmed its intention that EPA should proceed with the processing of the permit application. Following review of the permit application, the Region proposed denial of the permit on January 31, 1994, and thereafter, following a public hearing and period for public comment, made the final decision on September 15, 1994. (Although the Region obviously did not grant MSP's request for a BIF permit, it did ultimately make a decision on the request, which is all that

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[46] To obtain an operating permit, a hazardous waste management facility must file a permit application consisting of part A and part B. Part A is a short form containing certain basic information about the facility, such as the facility name, location, nature of business, regulated activities, and a topographic map of the facility site. 40 C.F.R. § 270.13. Part B requires substantially more comprehensive and detailed information that demonstrates compliance with the applicable technical standards for hazardous waste management facilities. 40 C.F.R. § 270.14. New facilities must submit part A and part B at the same time. 40 C.F.R. § 270.10 (f) (1). An existing hazardous waste management facility (*i.e.*, one that was in existence on November 19, 1980) or one that was in existence on the date of any statutory or regulatory change that makes the facility subject to RCRA), however, need only notify EPA of its hazardous waste management activity and file part A to obtain interim status and continue operations. 40 C.F.R. §§ 270.10(e) and 270.70(a). Existing facilities that have already filed part A to gain interim status, must submit part B in accordance with any applicable statutory deadline or earlier if requested by EPA or an authorized State. 40 C.F.R. § 270.10(a) ("Persons currently authorized with interim status shall apply for permits when required by the Director.").

any applicant is entitled to after asking the Agency to process a permit application.).

From the foregoing chronology, it can readily be seen that the two proceedings arose separately; and since the second proceeding was initiated by MSP, that proceeding can scarcely be characterized as an EPA-initiated push to acquire jurisdiction over matters properly reserved to the district court under Article III of the Constitution. The permit proceeding thus went forward at the behest of MSP, *after* the enforcement action against it had been filed in district court. Nevertheless, early on MSP could have sought a suspension of the permit proceeding if it truly believed that a constitutional collision between EPA and the courts was about to occur. For example, immediately after filing the Part A application, MSP could have requested the Region to stay processing of the application, but it did not. It also could have requested the Region to stay further processing of the application when it was asked to file Part B of the application, but it did not. In fact, MSP did not ask the Agency to stay its hand until shortly after it received the Region's proposed decision on its permit application.[47] Thus, it was not until after MSP was able to take a look at the Region's hand did it become inspired to seek a stay of the very proceeding it had initiated. The Region denied the request on February 22, 1994, responding in part as follows:

> EPA disagrees with your characterization that [the] proceeding on the permit application causes irreparable harm to MSP and is a wasteful use of administrative resources. First, MSP's vice president and general counsel George Eldredge has already been quoted as stating that "whatever action EPA pro-

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[47] Letter from Christopher Marraro, *Howrey & Simon*, to Carol M. Browner, *Administrator of EPA* (Feb. 10, 1994). This letter was eventually referred to the Region for response. *See* Letter from Walter L. Sutton, Jr., *Acting Regional Counsel, Region 6*, to Christopher H. Marraro, *Howrey & Simon* (Feb. 22, 1994).

> poses, and whatever the outcome of the lawsuit, the case is going to drag on for years. In the meantime, we'll be doing business as usual." This assessment contradicts your assertion of irreparable injury. We also note that it was MSP that filed the permit application, and the application has been reviewed by EPA and is ready for administrative disposition. It is in fact an Agency permitting priority, announced as part of the Agency's May 1993 Draft Combustion Strategy, to expedite processing of permit applications of existing, operating hazardous waste burning incinerators, boilers and industrial furnaces. Furthermore, as you are aware, *a key reason for the timing of the Agency's tentative denial was the express urging of the District Court in the civil enforcement action.*

Letter from Walter L. Sutton, Jr., *Acting Regional Counsel, Region 6,* to Christopher H. Marraro, *Howrey & Simon* (Feb. 22, 1994) (emphasis added) (citations omitted). Thus, assuming that there is no material error in the Region's characterization of the district court's actions, it appears that not even the court looked upon the Region's processing of the permit application as an infringement upon the court's powers. We naturally see no reason to find a conflict between the court and the Agency when the court itself sanctioned the continued processing of MSP's application. Although obviously there are overlapping issues in the two proceedings, their resolution is aimed at fundamentally different objectives, which fall outside of each other's assigned domain. Thus, the court is charged with determining whether MSP violated pre-BIF rule permitting regulations, whereas EPA is charged with applying the BIF rule in determining whether MSP is entitled to receive a BIF permit in the BIF rule era. For obvious reasons, the court is in no position to

make the latter determination; nor is EPA in a position to make the court's ruling.[48]

Accordingly, we reject MSP's contention that continuation of this proceeding violates the separation of powers doctrine of the U.S. Constitution.

3. *The Seventh Amendment and Issues Before the Jury*

Because there are issues in the district court enforcement action that are common to issues before the Agency in the administrative permit proceeding, and because the enforcement action is being tried before a jury, MSP contends that the Seventh Amendment bars the Agency from deciding those same issues in the permit proceeding. Petition at 43 *et seq.* This argument is little more than a variation on the separation of powers and collateral estoppel arguments discussed above, for it amounts to no more than telling the Agency that it should stay its hand because the case is now before an Article III court that is being tried before a jury. This argument is rejected for essentially the same reasons discussed earlier. For example, MSP contends that, with respect to issues on which the jury has already made findings, the Agency is bound by those findings.[49] *Id.*; Tr. at 20 (Jan. 12, 1995)

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[48] Moreover, there has been no administrative review or modification of an Article III court's judgment, nor could there be, because the district court has issued no judgment in the judicial enforcement action that would foreclose the Agency from concluding that its facility is not an aggregate kiln. The one judgment which the district court entered (pertaining to the "product" made by MSP from SWP's materal) is of very limited scope, and does not determine any issue respecting MSP's ultimate liability, much less foreclose the Region from deciding any of the grounds for the Region's permit decision.

[49] According to MSP, the jury found that MSP's kiln is an aggregate kiln, that MSP operates a kiln system that produces a aggregate, and that a significant percentage of the waste received by MSP undergoes a chemical reaction, so as to become inseparable by physical means, and is transformed into a "product produced for the general public's use." Petition at 44.

(oral argument). The practical import of this contention is to give preclusive effect to the jury's findings even though the law of collateral estoppel, as discussed earlier, clearly provides that "issue preclusion" only attaches when an issue has been incorporated into a final judgment. In the present instance, the issues that are subject to jury findings have never been reduced to a final judgment; consequently they cannot have a preclusive effect on issues pending before the Agency in the permit proceeding. We note also that neither the progress nor completion of the instant permit proceeding does anything to prevent the court case from continuing to be tried before a jury, and hence, does nothing to deprive MSP of its rights under the Seventh Amendment.[50] None of the Region's findings, nor ours, will deprive MSP in any way of its right to have the enforcement case tried before a jury. The enforcement case will move forward, before a jury, in accordance with the district court's own schedule, and subject to whatever rulings it might (or might not) make pertaining to our findings.[51]

Accordingly, for the reasons stated, MSP's Seventh Amendment claims are rejected.[52]

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[50] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

[51] It is not inconceivable to us that the district court might look upon our findings as having some evidentiary weight, or legal value, for purposes of the court proceedings. In that event, since the court proceeding is still pending, the court has the flexibility to factor our decision and findings into its rulings, including any rulings pertaining to the effect of the jury's earlier findings. In other words, it is possible for the court to address and ameliorate the effects of possibly conflicting findings.

[52] *In re Clay*, 35 F.3d 190 (5th Cir. 1994), and *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), are inapposite and do not support MSP's interpretation of the Seventh Amendment.

C. *The Bias Argument*

MSP charges that the denial of its BIF permit application constitutes a deprivation of property without due process of law because the person or persons who made the decision to deny the permit application were biased. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (An essential element of any meaningful due process hearing is an unbiased decisionmaker). Specifically, MSP charges that the ultimate decisionmaker, Dr. Allyn Davis, who is and was at all relevant times the Director of the Region's Hazardous Waste Division, and the Regional staff members who reviewed MSP's permit application prejudged the adjudicative factual issues in the case. MSP also charges that Agency personnel involved in the prosecution of the District Court action against MSP unduly influenced the Regional staff members responsible for reviewing MSP's permit application, thereby infecting the permitting staff with prosecutorial bias. For the reasons set forth below, we reject MSP's claims of prejudgment and bias. The evidence MSP cites in support of its claims does not come close to overcoming the presumption of honesty and integrity that attach to the actions of government personnel. We also conclude that review by the Environmental Appeals Board is an integral part of MSP's due process hearing and ensures that MSP's claims are heard by an independent body within the Agency before final Agency action is taken on MSP's permit application.

1. *Prejudgment*

Decisionmakers at administrative agencies are frequently required to perform multiple functions within the agency. For example, a decisionmaker might be called upon to participate in the investigation of the facts of a particular case, come to preliminary conclusions about the facts of the case, recommend a disposition of the case based on those conclusions, and then serve as the decisionmaker in the same case. The due process implications of such

mixing of functions were discussed at length in the U.S. Supreme Court decision in *Witbrow v. Larkin,* 421 U.S. 35 (1975).

In *Witbrow,* Wisconsin's State Examining Board was charged with enforcing State statutes prohibiting various acts of professional misconduct by physicians. The Court held that it would not violate due process for the Board, which has the power to adjudicate charges and issue license suspensions, to investigate the conduct of a licensed physician, make findings of fact and conclusions of law that the physician had engaged in certain proscribed conduct and that there was probable cause to believe that he had violated certain criminal provisions, and then institute charges on the basis of those findings and conclusions. The Court observed that:

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing bearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. * * *
>
> Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.
>
> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. * * *

> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.

Withrow at 56-58 (footnotes and citations omitted). The Court also described the heavy burden that must be borne by one who would claim that the mixing of investigative and adjudicative functions has worked a denial of due process:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow at 47. MSP must carry this burden if it is to demonstrate that Dr. Davis and his staff prejudged the adjudicative factual issues of this case or were infected with prosecutorial bias from the District Court enforcement action against MSP.

To show that Dr. Davis and his staff prejudged the adjudicative factual issues of this case, it is not enough for MSP to show that they formed or even expressed opinions about those issues before the hearing. Rather, in the words of the *Withrow* decision quoted above, MSP must show that Dr. Davis and his staff were "so psychologically wedded to [those opinions that they] would con-

sciously or unconsciously avoid the appearance of having erred or changed position," and that such opinions "as a practical or legal matter foreclosed fair and effective consideration" of the evidence presented during the permitting process. *Id.* at 57-58. Put another way, MSP must show that the minds of Dr. Davis and his staff were "irrevocably closed" on the adjudicative factual issues raised by MSP's permit application. *F.T.C. v. Cement Institute*, 333 U.S. 683, 701 (1948) (no due process violation despite fact that Commission had prior to hearing indicated in reports to Congress its position on facts at issue in pending case, where the Commission's earlier investigations of the issue "did not necessarily mean that the minds of its members were irrevocably closed" on the issue and persons suffering deprivation were "legally authorized participants in the hearing"). MSP has not even come close to making the showing necessary to establish prejudgment. At most, MSP has shown that Dr. Davis and his staff formed preliminary opinions about the nature of MSP's combustion activities and its status within the RCRA regulatory scheme, as they were required to do in the course of fulfilling their statutory and regulatory obligations.

In support of its prejudgment argument, MSP relies on the transcript of a deposition of Dr. Davis taken by MSP in the District Court enforcement action.[53] During the deposition, MSP asked Dr. Davis whether he had formed opinions about the nature of MSP's combustion activities and MSP's status within the RCRA regulatory scheme.

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[53] Based on Dr. Davis' responses in a July 1993 deposition taken by MSP, MSP asserts that Dr. Davis and his staff prejudged the following adjudicative determinations: (1) whether MSP's rotary kiln system is an industrial furnance; (2) whether MSP produces a product for the general public's use; (3) whether MSP can demonstrate a known market or disposition for its aggregate; (4) whether MSP's aggregate undergoes a chemical reaction so as to become inseparable by physical means; and (5) whether MSP is a "sham recycler."

In response, Dr. Davis revealed that he and his staff had indeed formed opinions on those subjects. This revelation, however, does not mean that Dr. Davis and his staff prejudged the adjudicative issues of this case. In the first place, any opinions formed by Dr. Davis and his staff were formed in the context of an ongoing, integrated regulatory process which culminated in MSP's submission of a part B permit application. During this process, Dr. Davis and his staff were required as a part of their regulatory and statutory duties to investigate MSP's combustion activities and to form opinions concerning the status of MSP's facility within the RCRA regulatory scheme.[54] Second, the deposition relied on by MSP makes clear that the opinions of Dr. Davis and his staff concerning MSP's facility are the kind of working hypotheses that form naturally and inevitably as a result of obtaining information through an investigation and that evolve with the addition of more information.[55] In other words, they are not the kind of entrenched opinions that prevent a decisionmaker from fairly assessing new information. Thus, MSP has failed to demonstrate, as it was required to do, that Dr. Davis or his staff were "so psychologically wedded

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[54] For example, between 1985, when MSP commenced operating its combustion device, and 1991, when the BIF rule was promulgated, it was the Regional permitting staff's duty to investigate MSP's facility to determine whether it was engaged in legitimate recycling activities and thus exempt from regulation. Later, when the BIF rule was promulgated and MSP claimed entitlement to BIF interim status, it was the permitting staff's duty to investigate MSP's self-characterization as an industrial furnance entitled to BIF interim status. It also was required to investigate whether MSP was complying with the interim status standards applicable to BIFs at 40 C.F.R. § 266.103. As part of these duties, the Regional staff members investigating MSP were required to report their findings to Dr. Davis.

[55] In his deposition, Dr. Davis makes clear that his opinions were based only on the investigations of his staff and he indicates that he would be receptive to any new information about MSP's facility. Petition for Review at 10 ("The letter indicates that based on the information available to us at that time, yes."); *id.* at 11 ("In 1985, when I indicated that the Agency felt Marine Shale was an in-

to [their opinions that they] would consciously or unconsciously avoid the appearance of having erred or changed position," and that such opinions "as a practical or legal matter foreclosed fair and effective consideration" of the evidence presented during the permitting process. *Witbrow, supra,* 421 U.S. at 57-58. Nor has MSP demonstrated that their minds were "irrevocably closed," in the words of the *Cement Institute* decision. Rather, the mixing of investigative functions (and the tentative opinions that form as a natural consequence of such functions) and adjudicative functions by Dr. Davis and his staff is precisely the kind of mixing of functions that was upheld as constitutionally permissible in *Witbrow* and has since been approved by many courts.[56] We con-

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cinerator, that was based on the information available at that time."); *id.* at 16 ("Again, based on briefings that I've had over the years."); *id.* at 17 ("Based on the information that was available to EPA at that time, Marine Shale was a sham recycler that required appropriate enforcement action."); *id.* at 18 ("I believe once the original determination was made, there was no new information that was significant that changed our mind. Yes, at that time we felt that Marine Shale was a sham recycler.").

[56] *See Kersel Food Market, Inc. v. National Labor Relations Board,* 868 F.2d 881, 888 (6th Cir.) (no due process problem where statutory scheme allows NLRB to first pursue an injunction against any employer to restrain further activity in violation of the Act and then decide, through the hearing process, whether the employer has violated the Act) *cert. denied,* 493 U.S. 820 (1989); *U.S. v. Batson,* 782 F.2d 1307, 1314-1315 (5th Cir.) (even assuming that the hearing officers had decided beforehand that the facts constituted a prohibited scheme or device, "there is no significant evidence to indicate that any hearing officer's mind was irrevocably closed * * *.") *cert. denied,* 477 U.S. 906 (1986); *Alabamians for a Clean Environment v. Thomas,* 1987 U.S. Dist. LEXIS 15,148, 25-26 (N.D. Ala. 1987) (in EPA RCRA permit proceedings, no impermissible bias even if Region's permit officials expressed predisposition to grant permit application before public hearing on the proposed permits). *See also Marathon Oil Company v. EPA,* 564 F.2d 1253 (9th Cir. 1977). In *Marathon,* the U.S. Court of Appeals for the Ninth Circuit considered a challenge to the impartiality of the Regional Administrator in the permitting process. The Regional Administrator made a preliminary decision on the

clude, therefore, that MSP has not met its heavy burden of overcoming the presumption of honesty and integrity attaching to the actions of government decisionmakers.[57] [58]

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permit, sent the permit decision to an administrative law judge for an evidentiary hearing, and then issued an initial decision after the ALJ had completed the evidentiary hearing. The Court concluded that:

> It is neither self-evident, nor have petitioners presented evidence to suggest that the review procedure here poses the "unacceptable risk of bias" present in *Morrissey*, *Murchison* or *Turney*. Rather, vesting the initial decision in the Regional Administrator, who after further hearings before an Administrative Law Judge reviews the manner prior to the issuance of an initial license, more nearly resembles the permissible combination of investigation and adjudication sanctioned by *Wilbrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975), than, for example, the situation in which a judge receives as compensation part of a fine which he levies, *Turney v. Obrio*, *supra*. We see no more reason to assume that a Regional Administrator cannot objectively review his earlier decision in light of additional hearings than to assume that a federal judge cannot retry or review a case after its remand following the initial trial or review.

Id. at 1265.

[57] That Dr. Davis publicly announced his opinions in a deposition taken by MSP does not alter this conclusion. Dr. Davis was compelled to answer under oath whether he had formed opinions about MSP's combustion device. He had no choice but to reveal that, based on the reports and conclusions that he had received from his staff, he had indeed formed opinions concerning MSP's combustion activities, as he was required to do to fulfill his statutory and regulatory obligations. Unlike the F.T.C. Commissioner who gave a speech announcing his position on a pending matter in *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 590 (D.C. Cir. 1970), relied on by MSP, Dr. Davis' testimony at the deposition did not in our view have the "effect of entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.* For the same reason, the other "public announcement" cases cited by MSP are inapposite.

[58] MSP also points to several of Dr. Davis' actions as evidence of prejudgment, specifically: (1) his effort to solicit the concur-

2. *Involvement in the Enforcement Action*

MSP also charges that Agency personnel involved in the prosecution of the District Court action against MSP unduly influenced Regional permitting staff members responsible for reviewing MSP's permit application, thereby infecting the permitting staff with prosecutorial bias. MSP believes that the standard for determining whether enforcement personnel exerted undue influence over the Regional permitting staff may be derived from the decision of the United States Court of Appeals for the Seventh Circuit

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rence of another regulatory body in the conclusion that the Dexter Leonard property posed an imminent and substantial endangerment; (2) his involvement in EPA's RCRA 3007 enforcement action against MSP relating to the Dexter Leonard property; and (3) his participation in the government's prosecution of MSP. With respect to the last of these reasons, MSP asserts that Dr. Davis initiated the investigation into the status of MSP's facility, referred the matter to Regional Counsel for possible enforcement, has cooperated with Regional Counsel and their Washington counterparts throughout the enforcement action, and has had ex parte contacts concerning the merits of the case.

Upon careful review of MSP's arguments and the Region's response to them, we conclude that Dr. Davis' involvement in the actions listed above, in itself, does not establish that Dr. Davis prejudged the adjudicative factual issues raised by MSP's permit application. At most, Dr. Davis' involvement in the actions cited above serve only to remind us that Dr. Davis was at all times relevant to this case the Director of the Hazardous Waste Management Division with oversight authority over the RCRA Enforcement Branch as well as the RCRA Permit's Branch. In order to raise a due process concern, MSP would need to show not only that Dr. Davis exercised oversight of the actions listed above, but that his oversignt of these actions caused him to develop entrenched opinions concerning the adjudicative factual issues raised in the permit proceeding. MSP attempts to make such a showing with citations to the 1993 deposition discussed in the text above. For the reasons cited in the text, however, we conclude that the deposition does not support the conclusion that Dr. Davis prejudged the adjudicative factual issues of the case. We therefore conclude that, with respect to the actions listed above, MSP has not carried its heavy burden of overcoming the presumption of honesty and integrity in the actions of government decisionmakers.

in *Bethlehem Steel Corporation v. E.P.A.*, 638 F.2d 994, 1008 (7th Cir. 1980). Because commingling of prosecutorial and adjudicative functions is only proscribed under certain circumstances, *Bethlehem Steel* provides a useful benchmark of the level of commingling that compromises the neutrality of a decisionmaker. We therefore discuss the decision at some length below.

In the *Bethlehem Steel* case, EPA's Administrator disapproved the Indiana Air Pollution Control Board's ("IAPCB") issuance to Bethlehem Steel of a delayed compliance order ("DCO"). The DCO would have extended the time in which Bethlehem Steel was required to comply with the Indiana State Implementation Plan ("SIP"). After the IAPCB issued the DCO, but before the Administrator disapproved it, EPA enforcement attorneys instituted an enforcement action against Bethlehem Steel for violations of the SIP. The EPA attorneys in charge of the enforcement proceeding were the same attorneys who were principally in charge of reviewing the DCO and recommending a disposition of the DCO to the Administrator. Bethlehem Steel challenged the disapproval of the DCO, contending that the commingling of prosecutorial and adjudicative functions in the same EPA attorneys amounted to a denial of due process. The Court agreed. The Court noted that, in addition to such commingling, the following circumstances created at least the appearance of a due process violation: (1) the timing of the DCO decision so as to gain tactical advantage in the enforcement action; (2) the attempt to require Bethlehem Steel to waive various defenses it might have had in the enforcement action as a condition of obtaining approval of the DCO; (3) the communication between enforcement attorneys and the Administrator's office after the time had passed for public comment and after the enforcement action had been filed; (4) the use of language in the Administrator's proposed and final disapprovals that was substantially identical to the language used in a memorandum written by the lead attorney engaged

in the enforcement action; and (5) the Agency's refusal to disclose all of the information that was relevant to its decision. *Id.* at 1008-1010. The Court concluded that:

> [A]lthough many of these practices may not raise significant problems in normal Agency operations, we believe they do raise significant questions here where enforcement attorneys with substantial and significant input into the Administrator's decision on the DCO were, at the relevant time, engaged in litigation with Bethlehem over the same issues. These questions cast a shadow over, at least, the appearance of fairness in the Agency's review procedures utilized in this case.

Id. at 1010 (footnote omitted). Using the *Bethlehem Steel* decision as our standard for determining whether the level of commingling in this case deprived MSP of its due process rights, we conclude for the reasons set forth below that whatever minimal commingling of prosecutorial and adjudicative functions took place in this case, it is insignificant compared to the commingling that the Court found in *Bethlehem Steel.*

As evidence of such commingling in this case, MSP cites the following: (1) *After* the tentative decision to deny the permit was made, the Regional permitting staff received assistance in drafting the Statement of Basis from Steven Silverman, who had testified in the District Court action as an expert on the sham recycling criteria, and from Terry Sykes, who at various times was part of the staff in the enforcement action; and (2) William Honker, who directed the Regional permitting staff responsible for reviewing MSP's application, sent enforcement personnel a memorandum asking for "any information or analysis of information" available concerning the issues raised in the permit proceeding. For the following reasons, however, we do not believe that this evidence supports a conclusion of improper or undue commingling of prose-

cutorial and adjudicative functions under the standard set forth in *Bethlehem Steel*.

After the proposed decision to deny the permit had been made, the Statement of Basis embodying the decision was sent to Steven Silverman and Brian Grant of the Agency's Office of the General Counsel ("OGC") so that they could review and "finalize" the document. MSP believes that this was inappropriate because Steven Silverman was "intimately involved" in the enforcement action. We reject this conclusion. Mr. Silverman was never part of the staff that is prosecuting the enforcement action.[59] His role in the District Court action was limited to testifying as an expert on legal issues surrounding the sham recycling criteria. Region's Response to Petition at 73. Giving expert testimony on legal issues at a trial, in our view, hardly counts as "intimate involvement." In light of Mr. Silverman's limited involvement in the enforcement action, it does not strike us as inappropriate for the Region to refer the Statement of Basis to him and Brian Grant for finalizing. The document contained an extensive legal analysis involving the sham recycling criteria, and Mr. Silverman is a recognized expert in that area within OGC. One of the functions of OGC is to review Regional decisions for the soundness of the legal analysis in those decisions. Compared to the commingling found in *Bethlehem Steel*, we find that Mr. Silverman's role in finalizing the drafting of the Statement of Basis is of little consequence for due process purposes.

Terry Sykes' involvement in the enforcement action was more extensive than Mr. Silverman's, although the fact that Ms. Sykes resigned from the staff of the enforcement action, at least for a time, suggests that she did not

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[59] The Steven Silverman who helped draft the Statement of Basis for the Proposed Denial is *not* the same Steven Silverman who works for the Department of Justice and who is prosecuting the enforcement action against MSP. MSP may have originally confused the two.

play a leading role in that action. Despite her involvement in the enforcement action, the Region allowed Ms. Sykes to assist Elaine Taylor, a Regional staff attorney, in drafting the Statement of Basis for the proposed denial. Elaine Taylor explains in her affidavit that Ms. Sykes was called in to perform this task *after* the decision was made to issue a proposed denial of MSP's permit application. Ms. Taylor also explains that the task of drafting the Statement of Basis had been assigned to a Regional attorney, Hortense Haynes, but Ms. Haynes resigned from the case for health reasons. (Declaration of Elaine Taylor at 5.) Rather than assign the task to another member of the Regional permitting staff, the task was assigned to Ms. Sykes because of the complexity of the legal issues, the limited personnel resources available to the Region, and the short time frame involved. (Declaration of Elaine Taylor at 5.) Ms. Taylor also asserts that Ms. Sykes had resigned from the enforcement staff several months before she assisted in drafting the Statement of Basis (Declaration of Elaine Taylor at 5), although she may have had sporadic involvement in the case both several weeks before and several weeks after drafting the Statement of Basis. Region's Reply Brief at 13-14.

The record suggests that the Region was sensitive to the possibility of improper commingling of prosecutorial and adjudicative functions in this case, and therefore took great pains to maintain a wall of separation between the enforcement action and the permit proceeding. (Declaration of William K. Honker; Declaration of Allyn M. Davis.) In view of Ms. Sykes' involvement in the enforcement action, however, Ms. Sykes' role in drafting the Statement of Basis represents a significant breach in the Region's efforts. Given her involvement in the enforcement action, the decision to allow Ms. Sykes to assist in drafting the Statement of Basis was, in our view, a mistake in judgment, albeit an understandable mistake in light of the staffing problems that unexpectedly arose when Hortense Haynes resigned from the case. Nevertheless, we do

not share MSP's view that the breach has constitutional implications.

It is important to keep Ms. Sykes' involvement in the permit proceeding in perspective. The record supports the conclusion that Ms. Sykes neither recommended nor made the decision to deny the permit application. (Declaration of Elaine Taylor at 5.) Ms. Sykes was called in to assist in the drafting of the Statement of Basis only *after* the decision to deny the permit had been made. *Id.* It appears that Ms. Sykes' role was akin to that of a law clerk who drafts a decision for a judge according to instructions that dictate both the result to be reached and the rationale for reaching it. (Declaration of Elaine Taylor at 5.) We conclude, therefore, that Ms. Sykes did not have a "substantial and significant input" into Dr. Davis' decision to deny MSP's permit, in the words of the *Bethlehem Steel* decision.

It is also important to remember that, as matter of law, "a certain amount of commingling [between EPA adjudicative and EPA prosecutorial functions] is normal and acceptable." *United States v. National Steel Corp.*, 767 F.2d 1176, 1182 (6th Cir. 1985) (no due process violation where EPA personnel responsible for enforcing Clean Air Act consent decree interacted on a limited basis with EPA personnel responsible for adjudicating National Steel's application for an alternate emission reduction option that would have allowed National Steel to avoid meeting certain requirements of consent decree). The Region's effort to maintain a strict separation between the enforcement action and the permit proceeding appears to have gone further than the law requires. A deviation from the Region's strict program of separation, therefore, does not necessarily rise to the level of a constitutional violation. Ms. Sykes' role in drafting the Statement of Basis is, in our view, the only real breach in an otherwise successful effort to maintain this strict separation. The Region should not be punished for falling short of a self-imposed

standard of separation that is actually more strict than the Constitution requires.

As evidence of improper commingling of prosecutorial and adjudicative functions, MSP also cites the memorandum from William Honker, asking enforcement attorneys to provide "any information or analysis of information" they possessed on the issues raised by MSP's permit application. MSP treats this memorandum as a "smoking gun," arguing that it is obviously a coded message inviting enforcement attorneys to tell the permitting staff how to decide MSP's permit application. We reject MSP's interpretation as pure speculation. A far more plausible reading of the memorandum is that Mr. Honker simply wanted to obtain any information generated by the enforcement staff that might be relevant to the permit proceeding. Because some of the issues in the enforcement action are similar to those in the permit proceeding (almost identical, according to MSP), some minimal level of commingling was inevitable if only to allow the permitting staff to gain physical access to relevant information previously generated in connection with the enforcement action.

In sum, using the *Bethlehem Steel* standard endorsed by MSP, we conclude that whatever commingling between prosecutorial and adjudicative functions occurred in this case, the level of such commingling was minimal and thus did not begin to approach the level of commingling found in *Bethlehem Steel*. Although the Region committed an error in judgment when it allowed Ms. Sykes to assist in drafting the Statement of Basis, nothing in the record suggests that she or any other member of the enforcement staff had a "substantial and significant input" into the decision to deny MSP's permit application. We conclude, therefore, that MSP has failed to carry its heavy burden of overcoming the presumption of honesty and

integrity that attaches to the actions of government decisionmakers.[60]

3. *The Role of the Environmental Appeals Board*

In assessing whether these permit proceedings meet the dictates of due process, the role of the Environmental Appeals Board must also be considered. The Region's consideration of MSP's part B permit application is merely one stage in an integrated permitting process that did not end with the issuance of the Regional decision that is now on review. Because MSP appealed the Region's decision, the decision did not constitute final agency action[61] Consequently, the Board's review is the final stage

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[60] MSP also makes much of the fact that the Statement of Basis for the proposed denial is almost identical to the Statement of Basis for the final permit decision. MSP believes that the similarity between the two documents means that the Region did not consider the information submitted to it during the comment period. In support of this assertion, MSP points out that the final Statement of Basis cites only information from the trial that supports the Region's decision. We reject this argument for several reasons. First, as its name suggests, a Statement of Basis is meant to communicate the information that the Region relied on in making its decision. Because the Region was not persuaded by the materials that MSP submitted, it did not rely on those materials and they naturally did not form the basis of the Region's decision. Second, the response to comments is the document that is meant to contain the Region's response to information that it did not rely on to make its decision. The Region did respond to MSP's materials in its Response to Comments. Finally, in view of the fact that MSP submitted as its comments reams of undigested trial transcripts, without highlighting significant parts or explaining its reasons for submitting the materials, it is not immediately obvious to us that the Region was even required to respond to MSP's materials. That it actually waded through those materials and responded to them at all is compelling evidence of the Region's good faith effort to give fair consideration to MSP's arguments.

[61] Where the decision of the Region is appealed to the Board, the Region's decision does not become final agency action, unless the Board denies review. 40 C.F.R. § 124.19(c). *Cf. Puerto Rico*

of the permitting process and is integral to MSP's due process hearing.[62] The Board is not part of any other office in the Agency and answers only to the Administrator of the Agency.[63] In addition, the Board has devoted con-

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Aqueduct and Sewer Authority v. E.P.A., Slip op. 93-2340, at 3, n.3 (1st Cir. 1994) (With respect to NPDES permits, "the initial decision [of the Region] constitutes final agency action only when the Board denies review or summarily affirms, *see* 40 C.F.R. § 124.91(f) (1993), not where, as here, the Board writes a full opinion * * *.").

[62] *See Alabamians for a Clean Environment v. Thomas*, 1987 U.S. Dist. LEXIS 15148 (N.D. Ala. 1987). In *Alabamians*, EPA and the State of Alabama jointly issued a RCRA permit. After the two agencies had made their final decisions to grant the permit, citizens groups appealed, arguing among other things that their due process rights had been infringed because some of the EPA staff had made statements before the public hearing to the effect that they were predisposed to grant the permit. The citizens groups argued that such statements reflected prejudgments and bias. The Court rejected the attack as premature because the citizens groups had not exhausted their administrative remedies. The Court observed that

> The plaintiffs due process attacks focus on whether the consideration of the permits was improper. However, neither agency's consideration is final at this time. The procedures which remain under RCRA and the Alabama Environmental Management Act are part of the process by which an interested person may have the permit decisions scrutinized. To allow the plaintiff's to attack the agencies' permit consideration on grounds that such consideration is biased or inadequate before the process of consideration is complete would be unnecessarily speculative.

Id. at 23. The Court's observation suggests that the appellate process is an integral part of the permitting process and that the adequacy of a due process hearing cannot be judged until the Agency's appellate procedures have run their course.

[63] *See* 40 C.F.R. § 1.25(e); 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992) ("Another virtue of the [newly created] Board is that it will make clear that the Administrator's enforcement authority (delegated to various Regional and Headquarters enforcement officers) and the Administrator's adjudicative authority are delegated to, and exercised by, separate and distinct components of the

siderable time and effort to this case and has given careful and independent review to the record that was before the regional staff, including transcripts of the expert testimony that serves as the linchpin of each side's argument. As a consequence, the Board has been able to consider MSP's contentions without any Regional filtering. The transcripts and studies that form the factual basis of both the Region's and MSP's reports were presented to the Board without any abridgement. Further, the Board has had the benefit of oral argument and voluminous briefing from the parties. It is based on this independent assessment of the record that the Board finds itself in agreement with the Region's conclusion that MSP does not function as an aggregate kiln within the meaning of § 260.10. The Board's involvement in this case ensures that MSP's claims have been fairly heard and carefully considered by an independent component of the Agency. In keeping with established principles of due process, this hearing has taken place *before* final Agency action on MSP's permit application. In view of the Board's involvement, we believe that MSP simply has no basis for arguing that its contentions supporting issuance of a BIF permit were not fairly heard and considered by an impartial decisionmaker.

III. *CONCLUSION*

For the reasons stated above, the Region's decision to deny MSP's BIF permit application is affirmed and this matter is remanded so that the Region can issue a final permit denial.[64] The basis for this affirmance is the

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Agency, thus inspiring confidence in the fairness of Agency adjudications.").

[64] As a separate basis for its permit decision, the Region also denied MSP's permit application because it believes that MSP cannot be counted on to comply with the terms and conditions of a RCRA operating permit, given MSP's record of noncompliance with environmental statutes, regulations, and permits. As authority for denying the permit on this basis, the Region cites the so-called

Region's conclusion that MSP's facility does not produce aggregate and therefore does not meet the industrial furnace definition. We recognize that the Region based its decision on other grounds as well, and to the extent we have not ruled on those other grounds, nothing in this decision should be construed as preventing the Region from basing its final decision on these other grounds. An appeal to the Board from the Region's final permit denial will not be necessary to exhaust administrative remedies. *See* 40 C.F.R. § 124.19(f)(1).

So ordered.[65]

"omnibus clause" at section 3005(c)(3) of RCRA, 42 U.S.C. § 6925(c)(3). That section provides in pertinent part that: "Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." Although the language of the provision does not appear to contemplate denials of permits, the Agency has traditionally read the provision as authorizing denials of permits where the Agency can craft no set of permit conditions or terms that will ensure protection of human health and the environment. 50 Fed. Reg. 28,723 (July 15, 1985) ("The Agency believes that the authority to issue permits containing conditions deemed necessary to protect human health and the environment must encompass the authority to deny permits where necessary to afford such protection."); *In re Ecolotec, Inc.*, RCRA Appeal No. 87-14 (Adm'r, Dec. 14, 1988) (same). Such authority clearly extends at least to situations where protection of human health and the environment cannot be ensured *even if the permit is complied with*. In other words, if *compliance with* a permit cannot ensure protection of human health and the environment no matter what conditions or terms are put into the permit, then the Agency has authority under the omnibus clause to deny the permit. In this case, however, the Region would extend the authority to deny permits even so those situations where compliance with the conditions and terms of the permit *would* ensure protection of human health and the environment. It is not immediately obvious to us, however, that the Agency's authority to deny permits under the omnibus clause extends to such situations. In any event, we need not definitively resolve this issue now, since we are upholding the Region's denial on another ground.

[65] The parties have filed several motions on which the Board has not yet ruled. The Board now rules as follows: 1) the *Motion of*

Marine Shale Processors, Inc. to Supplement the Record on Appeal With the Attached Exhibits (October 20, 1994) and *Motion of Petitioner Marine Shale Processors, Inc. to Supplement the Administrative Record on Appeal* (November 1, 1994), are granted. The supplemental exhibits accompanying these motions were reviewed prior to issuance today's decision; 2) the *Expedited Motion of Petitioner Marine Shale Processors, Inc. for Discovery Regarding Decisionmaker Bias in Region VI's Denial of MSP's BIF Application* (October 28, 1994) is denied. As it is now clear who was involved in the permitting decisions affecting MSP's facility, any such discovery is unnecessary; 3) the *Motion and Incorporated Memorandum of Marine Shale Processors, Inc. to Include Newly Discovered Evidence in the Administrative Record* (December 20, 1994) is granted and the attached memorandum from William K. Honker, Chief of the RCRA Permits Branch to Randy Brown, Chief RCRA Enforcement Branch, has been reviewed prior to reaching today's decision; 4) the *Petition of Marine Shale Processors, Inc. for Review of Denial of Request for Evidentiary Hearing and Motion to Consolidate with RCRA Appeal 94-12* ("Request for Evidentiary Hearing") (November 18, 1994) is denied. Following the Region's final decision denying MSP's BIF permit application, MSP sought an evidentiary hearing to the extent the denial was based on MSP's alleged prior non-compliance with various federal and State environmental statutes. The petition states that the Region's failure to respond to this request within thirty days constituted a *de facto* denial of the request from which MSP seeks review by the Board. *Request for Evidentiary Hearing*, at 3. The Region officially denied MSP's request for an evidentiary hearing on December 8, 1994. As today's decision affirms the Region's permit denial on the ground that MSP's facility is not an aggregate kiln and thus does not meet the definition of industrial furnace at 40 C.F.R. § 260.10, the issue upon which MSP seeks an evidentiary hearing is now moot. *See supra* note 64. MSP's *Request for Evidentiary Hearing* is therefore denied; 5) the Region's *Motion to Lodge Document with the Board*, (Feb. 16, 1995) is denied. The Region seeks to file with the Board a Federal Register Notice extending the time period for comment on a proposed rule relating to placement of slags derived from treatment of hazardous wastes KO62 and FOO6 (59 Fed. Reg. 67,256 (Dec. 29, 1994)). As this notice is not relevant to the issue before us, the Region's motion is denied; and 6) the following motions are granted and the accompanying submissions have been reviewed: *Motion of the United States Environmental Protection Agency to File a Corrected Response*, (November 25, 1994), *Motion of Marine Shale Processors, Inc. for Leave to File a Reply Memorandum in Support of its*

Petition for Review of BIF Permit Denial (December 5, 1994), *EPA's Request for Leave to Respond to MSP's Reply Memorandum* (December 20, 1994); *Marine Shale Processors, Inc.'s* [*Request to File*] *Responses to the Region's Letter Memoranda and Davis Affidavit*, (January 6, 1995), [*Marine Shale Processor's Request to Submit*] *Post-Hearing Memorandum*, (January 17, 1995), [*Region VI's Request to Submit*] *Response to Petitioner's Post-Hearing Memorandum and to Issues Raised at Oral Argument*, (January 23, 1995), and *MSP's* [*Request*] *to Reply to Region VI's Response to MSP's Post-Hearing Memorandum* (January 27, 1995).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Decision and Order in the matter of Marine Shale Processors, Inc., RCRA Appeal No. 94-12, were sent to the following persons by first class mail, with postage pre-paid:

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MILDRED T. JOHNSON
Secretary

Dated: Mar. 20, 1995

APPENDIX J

[SEAL]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 6
1446 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

April 11, 1995

Certified Mail—Return Receipt Requested

Darren M. Bernhard
Howrey & Simon
Attorneys at Law
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Re: Denial of Marine Shale Processors, Inc.
Motion for Stay Pending Appeal
EPA ID No. LAD981057706

Dear Mr. Bernhard:

After giving careful consideration to your Motion of March 21, 1995 requesting that the Region administratively stay its decision to deny the application of your client, Marine Shale Processors, Inc. ("MSP"), for a hazardous waste permit as an industrial furnace, I hereby deny your request for the reasons set fort hbelow.

Under 5 U.S.C.A. Chapter 7, Section 705, I may postpone the effective date of action taken by the Agency, pending judicial review, if "justice so requires." In this situation justice is best served by allowing time for the orderly cessation of hazardous waste combustion activities, as provided in the Notice of Final Agency Action letter of April 11, 1995. I am not convinced that justice is served by allowing a facility to continue to operate at risk to human health and the environment when no permit has been issued and there is no interim status.

I am also persuaded that MSP cannot satisfy the judicial criteria for a stay, specifically relating to the likeli-

hood of success on the merits, since the administrative record fully supports the Region's determination that MSP is not operating an "aggregate kiln" within the meaning of 40 CFR 260.10. In addition, as the Region stated and the EPA Environmental Appeals Board affirmed, the combustion residue is not the "aggregate" contemplated in the regulatory definition of industrial furnance. The combustion ash has been rejected for commercial use on those few instances where the company tried to find a commercial aggregate use. See Administrative Record Exh. A-15 (rejection by the State of Louisiana); Trial Tr. 9:43; 9:65; 41:72 (rejection by Village of Bastrop). The evidence supports the Region's determination that MSP is not operating an "aggregate kiln" within the meaning of 40 CFR 260.10 because the device is not functioning as an integral component of a manufacturing process, as required by the rule.

I also cannot accept your arguments that MSP has been denied due process by EPA. MSP has been afforded exhaustive administrative procedures, including EAB review and my own review, and I am convinced these procedures were fair.

Since RCRA rules were developed to protect human health and the environment, it is clear to me that their repeated violation, as by MSP, results in harm to the environment and to the public. The record indicates that the company has been operating out of compliance with most of the major State and Federal environmental laws since its inception. I am convinced that justice is best served by requiring the company to commence compliance.

Sincerely,

/s/ Jane N. Saginaw
JANE N. SAGINAW
Regional Administrator

cc: Steven Silverman, EPA OGC
William A. Kucharski, LDEQ
James B. Thompson III, LDEQ

APPENDIX K

[SEAL]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

April 11, 1995

Certified Mail—Return Receipt Requested

George Badge Eldredge
Vice President and General Counsel
Marine Shale Processors, Inc.
Office of the General Counsel
9828 Highway 90
Morgan City, LA 70380

Re: Notice of Final Agency Action to Deny RCRA Permit Application, Marnie Shale Processors, Inc. EPA ID No. LAD981057706

Dear Mr. Eldredge:

On September 15, 1994, the U.S. Environmental Protection Agency, Region 6, denied Marine Shale Processors, Inc.'s (MSP's) application for a permit to operate an industrial furnace. On October 20, 1994, MSP appealed that denial to the Environmental Appeals Board (EAB). On March 17, 1995, the EAB issued a Final Decision and Order (Order) affirming the permit denial and remanding the matter to Region 6 to issue the final permit denial.

In accordance with the EAB's Order and 40 CFR 124.19(f)(1), this letter constitutes final agency action denying MSP's application for a permit to operate as an industrial furnace. This letter, as of April 11, 1995, is final agency action for allowing MSP to seek review of

this denial in the appropriate U.S. Court of Appeals, should MSP wish to do so. This denial will become effective on May 11, 1995 (in 30 days) in order to allow MSP time to effectuate the orderly cessation of the combustion of hazardous waste. For good cause shown, MSP may request an extension of the effective date for the cessation of the combustion of hazardous waste for an additional 30 days. Absent the granting of an additional 30 days, regulations require that MSP cease operation and construction of the "industrial furnaces, container storage areas, tanks and ancillary equipment" as identified in its permit application.

The effect of this denial is to require MSP to initiate regulatory closure of its hazardous waste management units, pursuant to the standards and procedurse set out in applicable regulations. After regulatory closure is completed, MSP can use its kiln and related units to combust non-hazardous wastes, to process new materials or for other purposes so long as no hazardous waste management occurs.

The EAB's Order affirmed the Region's denial on the basis that "MSP's facility does not produce aggregate and therefore does not meet the industrial furnace definition." Order, pg. 48. The EAB also recognized that Region 6 based its decision on additional grounds and that nothing in its Order prevents the Region from including these grounds in its final denial. Order, pgs. 48-49. Therefore, I am issuing this final denial based on all of the grounds stated in the "Statement of Basis for Denial of the Permit Application by Marine Shale Processors, Inc." dated September 15, 1994, not just the ground on which the EAB affirmed.

If you have any questions regarding facility operations issues, please contact Laurie King of my staff at (214) 665-6792. If you have any questions of a legal nature they should be directed to Jim Dahl in Office of Regional Counsel at (214) 665-2151.

Sincerely,

/s/ Jane N. Saginaw
JANE N. SAGINAW
Regional Administrator

cc: Steven Silverman, EPA OGC
William A. Kucharski, LDEQ
James B. Thompson III, LDEQ

APPENDIX L

[Filed June 18, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60228

MARINE SHALE PROCESSORS INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of an Order of the
Environmental Protection Agency

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 4/18/96, 5 Cir., ——, —— F.3d ——)
( )

Before REYNALDO G. GARZA, KING and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Re-

hearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States Circuit Judge

APPENDIX M

[Filed Apr. 18, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60228

E.P.A. #LAD981057706

MARINE SHALE PROCESSORS INC.,
Petitioner,

Versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Order of the
Environmental Protection Agency

Before REYNALDO G. GARZA, KING, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of for [sic] review of an order of the Environmental Protection Agency, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Environmental Protection Agency in this cause is affirmed.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: June 18, 1996

APPENDIX N

UNITED STATES CONSTITUTION

U.S. Const. Art. III, §§ 1 and 2, cl. 1

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizen thereof, and foreign States, Citizens or Subjects.

* * * *

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepted in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX O

FEDERAL STATUTES INVOLVED

5 U.S.C. § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

* * * *

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise

final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperable, for an appeal to superior agency authority.

* * * *

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due acount shall be taken of the account rule of prejudicial error.

* * * *

42 U.S.C. § 6925. Permits for treatment, storage, or disposal of hazardous waste

(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of Title 15 for the incineration of polychloroinated[1] biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter.

(b) Requirements of permit application

Each application for a permit under this section shall contain such information as may be required under regulations promulgated by the Administrator, including information respecting—

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[1] So in original. Probably should be "polychlorinated".

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter, or combinations of any such hazardous waste and any other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

(c) Permit issuance

(1) Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 of this title, the permit shall specify the time allowed to complete the modifications.

(2)(A)(i) Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(ii) Not later than the date five years after November 8, 1984, in the case of each application for a permit under this subsection for an incinerator facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(B) Not later than the date eight years after November 8, 1984, in the case of each application for a permit under this subsection for any facility (other than a facility referred to in subparagraph (A)) which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(C) The time periods specified in this paragraph shall also apply in the case of any State which is administering an authorized hazardous waste program under section 6926 of this title. Interim status under subsection (e) of this section shall terminate for each facility referred to in subparagraph (A)(ii) or (B) on the expiration of the five- or eight-year period referred to in subparagraph (A) or (B), whichever is applicable, unless the owner or operator of the facility applies for a final determination regarding the issuance of a permit under this subsection within—

(i) two years after November 8, 1984 (in the case of a facility referred to in subparagraph (A)(ii)), or

(ii) four years after November 8, 1984 (in the case of a facility referred to in subparagraph (B)).

(3) Any permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 6924 of this title. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of any application for a permit renewal shall consider improvements in the state of control and measurement technology as well as

changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

(d) Permit revocation

Upon a determination by the Administrator (or by a State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) of noncompliance by a facility having a permit under this chapter with the requirements of this section or section 6924 of this title, the Administrator (or State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) shall revoke such permit.

(e) Interim status

(1) Any person who—

(A) owns or operates a facility required to have a permit under this section which facility—

(i) was in existence on November 19, 1980, or

(ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,

(B) has complied with the requirement of section 6930(a) of this title, and

(C) has made an application for a permit under this section [2]

shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such appli-

[2] So in original. Probably should be followed by a comma.

cation has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. This paragraph shall not apply to any facility which has been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

(2) In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve months after November 8, 1984, unless the owner or operator of such facility—

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(3) In the case of each land disposal facility which is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section and which is granted interim status under this subsection, interim status shall terminate on the date twelve months after the date on which the facility first becomes subject to such permit requirement unless the owner or operator of such facility—

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after the date on which the facility first becomes subject to such permit requirement; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(f) Coal mining wastes and reclamation permits

Notwithstanding subsection (a) through (e) of this section, any surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201 et seq.] shall be deemed to be a permit issued pursuant to this section with respect to the treatment, storage, or disposal of such wastes or overburden. Regulations promulgated by the Administrator under this subchapter shall not be applicable to treatment, storage, or disposal of coal mining wastes and overburden which are covered by such a permit.

(g) Research, development, and demonstration permits

(1) The Administrator may issue a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards for such experimental activity have not been promulgated under this subchapter. Any such permit shall include such terms and conditions as will assure protection of human health and the environment. Such permits—

(A) shall provide for the construction of such facilities, as necessary, and for operation of the facility for not longer than one year (unless renewed as provided in paragraph (4)), and

(B) shall provide for the receipt and treatment by the facility of only those types and quantities of hazardous waste which the Administrator deems necessary for purposes of determining the efficacy and performance capabilities of the technology or process and the effects of such technology or process on human health and the environment, and

(C) shall include such requirements as the Administrator deems necessary to protect human health

and the environment (including, but not limited to, requirements regarding monitoring, operation, insurance or bonding, financial responsibility, closure, and remedial action), and such requirements as the Administrator deems necessary regarding testing and providing of information to the Administrator with respect to the operation of the facility.

The Administrator may apply the criteria set forth in this paragraph in establishing the conditions of each permit without separate establishment of regulations implementing such criteria.

(2) For the purpose of expediting review and issuance of permits under this subsection, the Administrator may, consistent with the protection of human health and the environment, modify or waive permit application and permit issuance requirements established in the Administrator's general permit regulations except that there may be no modification or waiver of regulations regarding financial responsibility (including insurance) or of procedures established under section 6974(b)(2) of this title regarding public participation.

(3) The Administrator may order an immediate termination of all operations at the facility at any time he determines that termination is necessary to protect human health and the environment.

(4) Any permit issued under this subsection may be renewed not more than three times. Each such renewal shall be for a period of not more than 1 year.

(h) Waste minimization

Effective September 1, 1985, it shall be a condition of any permit issued under this section for the treatment, storage, or disposal of hazardous waste on the premises where such waste was generated that the permittee certify, no less often than annually, that—

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

(i) Interim status facilities receiving wastes after July 26, 1982

The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 6924 of this title to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) of this section shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) of this section which receives hazardous waste after July 26, 1982.

(j) Interim status surface impoundments

(1) Except as provided in paragraph (2), (3), or (4), each surface impoundment in existence on November 8, 1984, and qualifying for the authorization to operate under subsection (e) of this section shall not receive, store, or treat hazardous waste after the date four years after November 8, 1984, unless such surface impoundment is in compliance with the requirements of section 6924(*o*)(1)(A) of this title which would apply to such impoundment if it were new.

(2) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) has at least one liner, for which there is no evidence that such liner is

leaking; (B) is located more than one-quarter mile from an underground source of drinking water; and (C) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section.

(3) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) contains treated waste water during the secondary or subsequent phases of an aggressive biological treatment facility subject to a permit issued under section 1342 of Title 33 (or which holds such treated waste water after treatment and prior to discharge); (B) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section; and (C)(i) is part of a facility in compliance with section 1311(b)(2) of Title 33, or (ii) in the case of a facility for which no effluent guidelines required under section 1314(b)(2) of Title 33 are in effect and no permit under section 1342(a)(1) of Title 33 implementing section 1311(b)(2) of Title 33 has been issued, is part of a facility in compliance with a permit under section 1342 of Title 33, which is achieving significant degradation of toxic pollutants and hazardous constituents contained in the untreated waste stream and which has identified those toxic pollutants and hazardous constituents in the untreated waste stream to the appropriate permitting authority.

(4) The Administrator (or the State, in the case of a State with an authorized program), after notice and opportunity for comment, may modify the requirements of paragraph (1) for any surface impoundment if the owner or operator demonstrates that such surface impoundment is located, designed and operated so as to assure that there will be no migration of any hazardous constitutent[3] into ground water or surface water at any future time. The Administrator or the State shall take

[3] So in original. Probably should be "constituent".

into account locational crieria established under section 6924(*o*)(7) of this title.

(5) The owner or operator of any surface impoundment potentially subject to paragraph (1) who has reason to believe that on the basis of paragraph (2), (3), or (4) such surface impoundment is not required to comply with the requirements of paragraph (1), shall apply to the Administrator (or the State, in the case of a State with an authorized program) not later than twenty-four months after November 8, 1984, for a determination of the applicability of paragraph (1) (in the case of paragraph (2) or (3)) or for a modification of the requirements of paragraph (1) (in the case of paragraph (4)), with respect to such surface impoundment. Such owner or operator shall provide, with such application, evidence pertinent to such decision, including:

(A) an application for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility, if not previously submitted;

(B) evidence as to compliance with all applicable ground water monitoring requirements and the information and analysis from such monitoring;

(C) all reasonably ascertainable evidence as to whether such surface impoundment is leaking; and

(D) in the case of applications under paragraph (2) or (3), a certification by a registered professional engineer with academic training and experience in ground water hydrology that—

(i) under paragraph (2), the liner of such surface impoundment is designed, constructed, and operated in accordance with applicable requirements, such surface impoundment is more than one-quarter mile from an underground source of drinking water and there is no evidence such liner is leaking; or

(ii) under paragraph (3), based on analysis of those toxic pollutants and hazardous constituents that are likely to be present in the untreated waste stream, such impoundment satisfies the conditions of paragraph (3).

In the case of any surface impoundment for which the owner or operator fails to apply under this paragraph within the time provided by this paragraph or paragraph (6), such surface impoundment shall comply with paragraph (1) notwithstanding paragraph (2), (3), or (4). Within twelve months after receipt of such application and evidence and not later than thirty-six months after November 8, 1984, and after notice and opportunity to comment, the Administrator (or, if appropriate, the State) shall advise such owner or operator on the applicability of paragraph (1) to such surface impoundment or as to whether and how the requirements of paragraph (1) shall be modified and applied to such surface impoundment.

(6)(A) In any case in which a surface impoundment becomes subject to paragraph (1) after November 8, 1984, due to the promulgation of additional listings or characteristics for the identification of hazardous waste under section 6921 of this title, the period for compliance in paragraph (1) shall be four years after the date of such promulgation, the period for demonstrations under paragraph (4) and for submission of evidence under paragraph (5) shall be not later than twenty-four months after the date of such promulgation, and the period for the Administrator (or if appropriate, the State) to advise such owners or operators under paragraph (5) shall be not later than thirty-six months after the date of promulgation.

(B) In any case in which a surface impoundment is initially determined to be excluded from the requirements of paragraph (1) but due to a change in condition (including the existence of a leak) no longer satisfies the provisions of paragraph (2), (3), or (4) and therefore

becomes subject to paragraph (1), the period for compliance in paragraph (1) shall be two years after the date of discovery of such change of condition, or in the case of a surface impoundment excluded under paragraph (3) three years after such date of discovery.

(7)(A) The Administrator shall study and report to the Congress on the number, range of size, construction, likelihood of hazardous constituents migrating into ground water, and potential threat to human health and the environment of existing surface impoundments excluded by paragraph (3) from the requirements of paragraph (1). Such report shall address the need, feasibility, and estimated costs of subjecting such existing surface impoundments to the requirements of paragraph (1).

(B) In the case of any existing surface impoundment or class of surface impoundments from which the Administrator (or the State, in the case of a State with an authorized program) determines hazardous constituents are likely to migrate into ground water, the Administrator (or if appropriate, the State) is authorized to impose such requirements as may be necessary to protect human health and the environment, including the requirements of section 6924(*o*) of this title which would apply to such impoundments if they were new.

(C) In the case of any surface impoundment excluded by paragraph (3) from the requirements of paragraph (1) which is subsequently determined to be leaking, the Administrator (or, if appropriate, the State) shall require compliance with paragraph (1), unless the Administrator (or, if appropriate, the State) determines that such compliance is not necessary to protect human health and the environment.

(8) In the case of any surface impoundment in which the liners and leak detection system have been installed pursuant to the requirements of paragraph (1) and in good faith compliance with section 6924(*o*) of this title

and the Administrator's regulations and guidance documents governing liners and leak detection systems, no liner or leak detection system which is different from that which was so installed pursuant to paragraph (1) shall be required for such unit by the Administrator when issuing the first permit under this section to such facility. Nothing in this paragraph shall preclude the Administrator from requiring installation of a new liner when the Administrator has reason to believe that any liner installed pursuant to the requirements of this subsection is leaking.

(9) In the case of any surface impoundment which has been excluded by paragraph (2) on the basis of a liner meeting the definition under paragraph (12)(A)(ii), at the closure of such impoundment the Administrator shall require the owner or operator of such impoundment to remove or decontaminate all waste residues, all contaminated liner material, and contaminated soil to the extent practicable. If all contaminated soil is not removed or decontaminated, the owner or operator of such impoundment shall be required to comply with appropriate post-closure requirements, including but not limited to ground water monitoring and corrective action.

(10) Any incremental cost attributable to the requirements of this subsection or section 6924(*o*) of this title shall not be considered by the Administrator (or the State, in the case of a State with an authorized program under section 1342 of Title 33)—

(A) in establishing effluent limitations and standards under section 1311, 1314, 1316, 1317, or 1342 of Title 33 based on effluent limitations guidelines and standards promulgated any time before twelve months after November 8, 1984; or

(B) in establishing any other effluent limitations to carry out the provisions of section 1311, 1317, or 1342 of Title 33 on or before October 1, 1986.

(11)(A) If the Administrator allows a hazardous waste which is prohibited from one or more methods of

land disposal under subsection (d), (e), or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsections) to be placed in a surface impoundment (which is operating pursuant to interim status) for storage or treatment, such impoundment shall meet the requirements that are applicable to new surface impoundments under section 6924(*o*)(1) of this title, unless such impoundment meets the requirements of paragraph (2) or (4).

(B) In the case of any hazardous waste which is prohibited from one or more methods of land disposal under subsection (d), (e), or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsection) the placement or maintenance of such hazardous waste in a surface impoundment for treatment is prohibited as of the effective date of such prohibition unless the treatment residues which are hazardous are, at a minimum, removed for subsequent management within one year of the entry of the waste into the surface impoundment.

(12)(A) For the purposes of paragraph (2)(A) of this subsection, the term "liner" means—

(i) a liner designed, constructed, installed, and operated to prevent hazardous waste from passing into the liner at any time during the active life of the facility; or

(ii) a liner designed, constructed, installed, and operated to prevent hazardous waste from migrating beyond the liner to adjacent subsurface soil, ground water, or surface water at any time during the active life of the facility.

(B) For the purposes of this subsection, the term "aggressive biological treatment facility" means a system of surface impoundments in which the initial impoundment of the secondary treatment segment of the facility utilizes intense mechanical aeration to enhance biological activity to degrade waste water pollutants and

(i) the hydraulic retention time in such initial impoundment is no longer than 5 days under normal operating conditions, on an annual average basis;

(ii) the hydraulic retention time in such initial impoundment is no longer than thirty days under normal operating conditions, on an annual average basis: *Provided*, That the sludge in such impoundment does not constitute a hazardous waste as identified by the extraction procedure toxicity characteristic in effect on November 8, 1984; or

(iii) such system utilizes activated sludge treatment in the first portion of secondary treatment.

(C) For the purposes of this subsection, the term "underground source or[4] drinking water" has the same meaning as provided in regulations under the Safe Drinking Water Act (title XIV of the Public Health Service Act) [42 U.S.C.A. § 300f et seq.]

(13) The Administrator may modify the requirements of paragraph (1) in the case of a surface impoundment for which the owner or operator, prior to October 1, 1984, has entered into, and is in compliance with, a consent order, decree, or agreement with the Administrator or a State with an authorized program mandating corrective action with respect to such surface impoundment that provides a degree of protection of human health and the environment which is at a minimum equivalent to that provided by paragraph (1).

* * * *

42 U.S.C. § 6976. Judicial review

* * * *

(b) Review of certain actions under sections 6925 and 6926 of this title

Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section

[4] So in original. Probably should be "of".

6925 of this title (or in modifying or revoking any permit which is deemed to have been issued under section 6935 (d)(1) of this title), or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement. Such review shall be in accordance with sections 701 through 706 of Title 5.

APPENDIX P

FEDERAL REGULATIONS INVOLVED

40 C.F.R. § 124.3 Application for a permit.

(a) *Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).* (1) Any person who requires a permit under the RCRA, UIC, NPDES, or PSD programs shall complete, sign, and submit to the Director an application for each permit required under §§ 270.1 (RCRA), 144.1 (UIC), 40 CFR 52.21 (PSD), and 122.1 (NPDES). Applications are not required for RCRA permits by rule (§ 270.60), underground injections authorized by rules (§§ 144.21 through 144.26), NPDES general permits (§ 122.28) and 404 general permits (§ 233.37).

(2) The Director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. See §§ 270.10, 270.13 (RCRA), 144.31 (UIC), 40 CFR 52.1 (PSD), and 122.21 (NPDES).

(3) Permit applications (except for PSD permits) must comply with the signature and certification requirements of §§ 122.22 (NPDES), 144.32 (UIC), 233.6(404), and 270.11 (RCRA).

(b) [Reserved]

(c) The Regional Administrator shall review for completeness every application for an EPA-issued permit. Each application for an EPA-issued permit submitted by a new HWM facility, a new UIC injection well, a major PSD stationary source or major PSD modification, or an NPDES new source or NPDES new discharger should be reviewed for completeness by the Regional Administrator within 30 days of its receipt. Each application for an EPA-issued permit submitted by an existing HWM facility (both Parts A and B of the application), existing injec-

tion well or existing NPDES source or sludge-only facility should be reviewed for completeness within 60 days of receipt. Upon completing the review, the Regional Administrator shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Regional Administrator shall list the information necessary to make the application complete. When the application is for an existing HMW facility, an existing UIC injection well or an existing NPDES source or "sludge-only facility" the Regional Administrator shall specify in the notice of deficiency a date for submitting the necessary information. The Regional Administrator shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

(d) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provision including RCRA section 3008, SDWA sections 1423 and 1424, CAA section 167, and CWA sections 308, 309, 402(h), and 402(k).

(e) If the Regional Administrator decides that a site visit is necessary for any reason in conjunction with the processing of an application, he or she shall notify the applicant and a date shall be scheduled.

(f) The effective date of an application is the date on which the Regional Administrator notifies the applicant that the application is complete as provided in paragraph (c) of this section.

(g) For each application from a major new HWM facility, major new UIC injection well, major NPDES new source, major NPDES new discharger, or a permit

to be issued under provisions of § 122.28(c), the Regional Administrator shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. (This paragraph does not apply to PSD permits.) The schedule shall specify target dates by which the Regional Administrator intends to:

(1) Prepare a draft permit;

(2) Give public notice;

(3) Complete the public comment period, including any public hearing;

(4) Issue a final permit; and

(5) In the case of an NPDES permit, complete any formal proceedings under subpart E or F.

* * * *

40 C.F.R. § 260.10 Definitions.

When used in parts 260 through 266, 268, and 270 through 273 of this chapter, the following terms have the meanings given below:

* * * *

Incinerator means any enclosed device that:

(1) Uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(2) Meets the definition of infrared incinerator or plasma arc incinerator.

* * * *

Industrial furnace means any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy:

(1) Cement kilns

(2) Lime kilns

(3) Aggregate kilns

(4) Phosphate kilns

(5) Coke ovens

(6) Blast furnaces

(7) Smelting, melting and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machine, roasters, and foundry furnaces)

(8) Titanium dioxide chloride process oxidation reactors

(9) Methane reforming furnaces

(10) Pulping liquor recovery furnaces

(11) Combustion devices used in the recovery of sulfur values from spent sulfuric acid.

(12) Halogen acid furnaces (HAFs) for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated.

(13) Such other devices as the Administrator may, after notice and comment, add to this list on the basis of one or more of the following factors:

(i) The design and use of the device primarily to accomplish recovery of material products;

(ii) The use of the device to burn or reduce raw materials to make a material product;

(iii) The use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw materials as principal feedstocks;

(iv) The use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product;

(v) The use of the device in common industrial practice to produce a material product; and

(vi) Other factors, as appropriate.

Infrared incinerator means any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

* * * *

Plasma arc incinerator means any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

* * * *

40 C.F.R. § 261.1 Purpose and scope.

(a) This part identifies those solid wastes which are subject to regulation as hazardous wastes under parts 262 through 265, 268, and parts 270, 271, and 124 of this chapter and which are subject to the notification requirements of section 3010 of RCRA. In this part:

(1) Subpart A defines the terms "solid waste" and "hazardous waste", identifies those wastes which are excluded from regulation under parts 262 through 266, 268 and 270 and establishes special management requirements for hazardous waste produced by conditionally exempt small quantity generators and hazardous waste which is recycled.

(2) Subpart B sets forth the criteria used by EPA to identify characteristics of hazardous waste and to list particular hazardous wastes.

(3) Subpart C identifies characteristics of hazardous waste.

(4) Subpart D lists particular hazardous wastes.

(b)(1) The definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled.

(2) This part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a solid waste and a hazardous waste for purposes of these sections if:

(i) In the case of sections 3007 and 3013, EPA has reason to believe that the material may be a solid waste within the meaning of section 1004(27) of RCRA and a hazardous waste within the meaning of section 1004(5) of RCRA; or

(ii) In the case of section 7003, the statutory elements are established.

(c) For the purposes of §§ 261.2 and 261.6:

(1) A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing;

(2) "Sludge" has the same meaning used in § 260.10 of this chapter;

(3) A "by-product" is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process.

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents.

(5) A material is "used or reused" if it is either:

(i) Employed as an ingredient (including use as an intermediate) in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process). However, a material will not satisfy this condition if distinct components of the material are recovered as separate end products (as when metals are recovered from metal-containing secondary materials); or

(ii) Employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

(6) "Scrap metal" is bits and pieces of metal parts (*e.g.*,) bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (*e.g.*, radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled.

(7) A material is "recycled" if it is used, reused, or reclaimed.

(8) A material is "accumulated speculatively" if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recy-

clable and has a feasible means of being recycled; and that—during the calendar year (commencing on January 1)—the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (*e.g.*, slags from a single smelting process) that is recycled in the same way (*i.e.*, from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under § 261.4(c) are not to be included in making the calculation. (Materials that are already defined as solid wastes also are not to be included in making the calculation.) Materials are no longer in this category once they are removed from accumulation for recycling, however.

Subpart C—Recyclable Materials Used in a Manner Constituting Disposal

40 C.F.R. § 266.20 Applicability.

(a) The regulations of this subpart apply to recyclable materials that are applied to or placed on the land:

(1) Without mixing with any other substance(s); or

(2) After mixing or combination with any other substance(s). These materials will be referred to throughout this subpart as "materials used in a manner that constitutes disposal."

(b) Products produced for the general public's use that are used in a manner that constitutes disposal and that contain recyclable materials are not presently subject to regulation if the recyclable materials have undergone a chemical reaction in the course of producing the products so as to become inseparable by physical means and if such products meet the applicable treatment standards in subpart D of part 268 (or applicable prohibition levels in

§ 268.32 or RCRA section 3004(d), where no treatment standards have been established) for each recyclable material (*i.e.*, hazardous waste) that they contain. Commercial fertilizers that are produced for the general public's use that contain recyclable materials also are not presently subject to regulation provided they meet these same treatment standards or prohibition levels for each recyclable material that they contain. However, zinc-containing fertilizers using hazardous waste K061 that are produced for the general public's use are not presently subject to regulation.

(c) Anti-skid/deicing uses of slags, which are generated from high temperature metals recovery (HTMR) processing of hazardous waste K061, K062, and F006, in a manner constituting disposal are not covered by the exemption in paragraph (b) of this section and remain subject to regulation.

* * * *

Subpart H—Hazardous Waste Burned in Boilers and Industrial Furnaces

40 C.F.R. § 266.100 Applicability.

(a) The regulations of this subpart apply to hazardous waste burned or processed in a boiler or industrial furnace (as defined in § 260.10 of this chapter) irrespective of the purpose of burning or processing, except as provided by paragraphs (b), (c), (d), and (f) of this section. In this subpart, the term "burn" means burning for energy recovery or destruction, or processing for materials recovery or as an ingredient. The emissions standards of §§ 266.104, 266.105, 266.106, and 266.107 apply to facilities operating under interim status or under a RCRA permit as specified in §§ 266.102 and 266.103.

Subpart B—Permit Application

§ 270.10 General application requirements.

(a) *Permit application.* Any person who is required to have a permit (including new applicants and permittees with expiring permits) shall complete, sign, and submit an application to the Director as described in this section and §§ 270.70 through 270.73. Persons currently authorized with interim status shall apply for permits when required by the Director. Persons covered by RCRA permits by rule (§ 270.60), need not apply. Procedures for applications, issuance and administration of emergency permits are found exclusively in § 270.61. Procedures for application, issuance and administration of research, development, and demonstration permits are found exclusively in § 270.65.

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